1990

Robert Kent Hill, Individually and as Personal Representative of the heirs of Tamara Elaine Hill, deceased, and Lorin Dean Caldwell, Individually and as Personaly Representative of the heirs of Troy Neil Caldwell, deceased v. State Farm Mututal Automobile Insurance Company: Brief of Appellant

Utah Court of Appeals

Glenn C. Hanni; Strong & Hanni; Attorneys for Respondent.
Roy A. Jacobsen, Jr.; Attorney for Appellants.

IN THE UTAH COURT OF APPEALS

ROBERT KENT HILL, Individually and as Personal Representative of the heirs of TAMARA ELAINE HILL, deceased, and LORIN DEAN CALDWELL, Individually and as Personal Representative of the heirs of TROY NEIL CALDWELL, deceased,	)	
Plaintiffs and Appellants,	)	
v.	)	Case No. 900546-CA
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)	Priority No. 16
Defendant and Respondent.	)	

ADDENDUM TO APPELLANTS' BRIEF

Appeal from the Third Judicial District Court,

Salt Lake County, State of Utah

The Honorable David S. Young, Presiding

Glenn C. Hanni
STRONG & HANNI
Sixth Floor Boston Building
Salt Lake City, Utah 84111
Attorneys for Defendant and Respondent State Farm Mutual Automobile Ins. Co.

Roy A. Jacobson, Jr. [A4480]
4005 Teewinot Road
P.O. Box 25205
Jackson, Wyoming 83001
Attorney for Plaintiffs and Appellants, Robert Kent Hill and Lorin Dean Caldwell

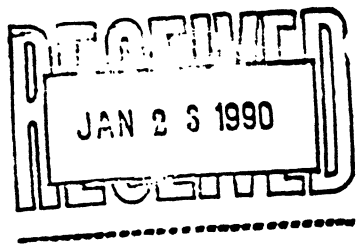
ADDENDUM
INDEX

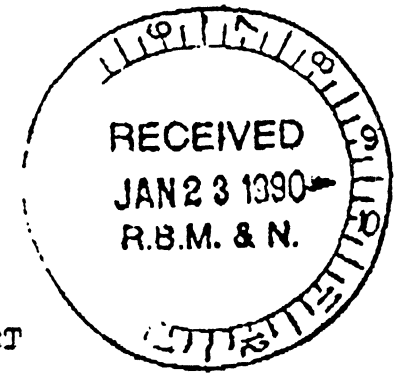
RECORD INDEX

LAW INDEX

RULES INDEX

2/7/90





IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

	:	MINUTE ENTRY
HILL, ROBERT KENT	:	
PLAINTIFF	:	CASE NUMBER 830908099 CV
	:	DATE 01/18/90
VS	:	HONORABLE DAVID S. YOUNG
	:	COURT REPORTER
STATE FARM MUTUAL AUTOMOBILE	:	COURT CLERK NP
DEFENDANT	:	

TYPE OF HEARING:
PRESENT:

P. ATTY. LAUCHNOR, WALLACE
D. ATTY. HANNI, GLENN C.

THE PLAINTIFF'S MOTION FOR LEAVE TO FILE A "FIRST AMENDED COMPLAINT" IS DENIED. THIS MATTER MUST PROCEED TO TRIAL WITH DISPATCH. THE CASE IS NOW IN IT'S SEVENTH (7TH) YEAR.

MR. HANNI IS TO PREPARE AN ORDER CONSISTENT HEREWITH AND WITH HIS MEMORANDUM IN OPPOSITION.

C.C. TO COUNSEL

FAX to 307 733-5248
ATTN SKIP

3/26/90

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

	:	MINUTE ENTRY
HILL, ROBERT KENT	:	
PLAINTIFF	:	CASE NUMBER 830908099 CV
	:	DATE 05/25/90
VS	:	HONORABLE DAVID S. YOUNG
	:	COURT REPORTER 9
STATE FARM MUTUAL AUTOMOBILE	:	COURT CLERK NP
DEFENDANT	:	

TYPE OF HEARING:
PRESENT:

P. ATTY. LAUCHNOR, WALLACE R.
D. ATTY. HANNI, GLENN C.

THE DEFENDANT STATE FARM'S MOTION FOR SUMMARY JUDGMENT IS GRANTED CONSISTENT WITH THE MEMORANDUM IN SUPPORT THEREOF. SINCE THE COURT HAS GRANTED THE MOTION, NO ORAL ARGUMENT IS NECESSARY AND IS THUS DENIED.

MR. HANNI IS REQUESTED TO PREPARE A JUDGMENT CONSISTENT HEREWITH AND WITH HIS PLEADINGS IN THIS MATTER.

C.C. TO COUNSEL

Glenn C. Hanni #A1327
STRONG & HANNI
Attorneys for Defendant
600 Boston Building
Salt Lake City, Utah 84111
Telephone: 532-7080

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ROBERT KENT HILL, Individually and as personal representative of the heirs of TAMARA ELAINE HILL, deceased, and LORIN DEAN CALDWELL, Individually and as personal representative of the heirs of TROY NEIL CALDWELL, DECEASED, Plaintiffs, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant.	NOTICE OF ENTRY OF JUDGMENT Civil No. C83-8099 Judge David S. Young

TO: PLAINTIFFS THROUGH THEIR COUNSEL OF RECORD:

You are hereby notified that judgment in the above-referenced matter was entered on March 26, 1990.

DATED this 2 day of April, 1990.

STRONG & HANNI

By _____
Glenn C. Hanni

100187

Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Notice of Entry of Judgment was mailed, postage prepaid, on April 3, 1990, to the following:

Roy A. Jacobson, Jr.
V. Anthony Vehar
Vehar, Beppler, Jacobson, Lavery & Rose
P. O. Box 189
Kemmerer, WY 83101

Wallace R. Lauchnor
Richards, Brandt, Miller & Nelson
50 South Main #700
Salt Lake City, Utah 84144

Patsy Wyatt

6/11/90

GLENN C. HANNI, #A1327
STRONG & HANNI
Attorneys for Defendant
Sixth Floor Boston Building
Salt Lake City, Utah 84111
Telephone: (801) 532-7080

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ROBERT KENT HILL, Individually and as personal representative of the heirs of TAMARA ELAINE HILL, deceased, and LORIN DEAN CALDWELL, Individually and as personal representative of the heirs of TROY NEIL CALDWELL, deceased,	NOTICE OF ENTRY OF JUDGMENT
Plaintiffs,	Civil No. C83-8099
vs.	Judge David S. Young
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	
Defendant.	

TO THE PLAINTIFFS AND THEIR ATTORNEYS:

You and each of you will please take notice that the court on June 11, 1990, entered a judgment in favor of defendant and against plaintiff Lorin Dean Caldwell, Individually and as personal representative of the heirs of Troy Neil Caldwell, deceased, no cause of action.

Dated this 14th day of June, 1990.

STRONG & HANNI

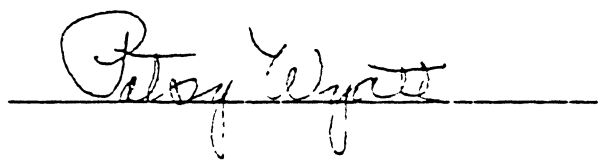
By Glenn C. Hanni
Glenn C. Hanni
Attorneys for Defendant

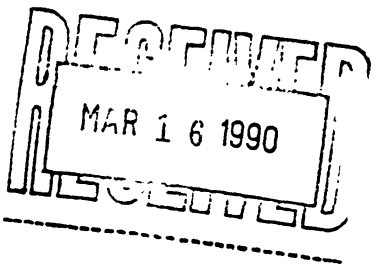
MAILING CERTIFICATE

I hereby certify that on the 14th day of June, 1990, I mailed a true and correct copy of the foregoing Notice of Entry of Judgment, first-class postage prepaid, to:

Wallace R. Lauchnor
Richards, Brandt, Miller & Nelson
50 South Main #700
Salt Lake City, Utah 84144

Roy A. Jacobson, Jr.
V. Anthony Vehar
Vehar, Beppler, Jacobson, Lavery & Rose
P. O. Box 189
Kemmerer, WY 83101





Glenn C. Hanni #A1327
STRONG & HANNI
Attorneys for Defendant
600 Boston Building
Salt Lake City, Utah 84111
Telephone: 532-7080

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ROBERT KENT HILL, Individually and as personal representative of the heirs of TAMARA ELAINE HILL, deceased, and LORIN DEAN CALDWELL, Individually and as personal representative of the heirs of TROY NEIL CALDWELL, deceased,	JUDGMENT
Plaintiffs,	
vs.	Civil No. C83-8099
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	Judge David S. Young
Defendant.	

Defendant's motion for summary judgment as to plaintiff Hill and for partial summary judgment as to plaintiff Caldwell was heard by the Honorable David S. Young, District Judge, pursuant to notice, on March 12, 1990. Glenn C. Hanni of the law firm of Strong & Hanni appeared on behalf of defendant, and V. Anthony Vehar of the law firm of Vehar, Beppler, Jacobsen, Lavery & Rose, P.C., and Wallace R. Lauchnor, Esquire, appeared on behalf of plaintiffs.

The court, having reviewed defendant's motion and memoranda, plaintiffs' memorandum, having considered oral argument, and being advised in the premises, now, therefore;

IT IS HEREBY ORDERED, ADJUDGED, FOUND, AND DECREED as follows:

1. The court finds that since the Supreme Court's decision in Hill v. State Farm Mut. Auto. Ins. Co. 765 P.2d 864 (Utah 1988), State Farm has paid the $5,510 plus interest to plaintiffs. Therefore, the only remaining claims are for bad faith and punitive damages.

2. Defendant's motion for summary judgment as to plaintiff Hill is granted on the following grounds:

(a) Hill's claim for bad faith against defendant is an insurance first-party bad faith claim similar to Beck v. Farmers Insurance Exchange 701 P.2d 795 (Utah 1985). Since Hill was not in privity of contract with defendant there was no duty owed to him by defendant and he has no cause of action for first-party insurance bad faith against State Farm;

(b) Hill has no claim to recover punitive damages against State Farm because he has alleged no independent tortious conduct against State Farm. No punitive damages may be awarded for a claim of first-party insurance bad faith because such claim constitutes a contract action, not a tort action.

3. Summary judgment dismissing Hill's complaint against State Farm should be entered, with prejudice, on the merits, no cause of action;

4. State Farm's motion for partial summary judgment as to Caldwell's claim for punitive damages is granted on the grounds that Caldwell's complaint against State Farm is for first-party insurance bad faith, which is a contract claim, and for which no punitive damages may be awarded absent an allegation of independent tortious conduct. Caldwell has failed to allege any independent tortious conduct against State Farm which would be the basis for punitive damages;

5. Partial summary judgment should be entered in favor of defendant and against plaintiff Caldwell dismissing Caldwell's claim for punitive damages, with prejudice, on the merits, no cause of action;

6. The court further finds that the issues raised by plaintiffs' claims of first-party bad faith against State Farm are and have been throughout the pendency of this action fairly debatable issues.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Summary judgment is hereby entered in favor of State Farm and against plaintiff Hill, and Hill's complaint and all claims contained therein against State Farm, are dismissed with

prejudice, on the merits, no cause of action;

2. Partial summary judgment is hereby entered in favor of State Farm and against plaintiff Caldwell as to plaintiff Caldwell's claims for punitive damages against State Farm, and said claims for punitive damages are dismissed with prejudice, on the merits, no cause of action.

DATED this _____ day of March, 1990.

BY THE COURT:

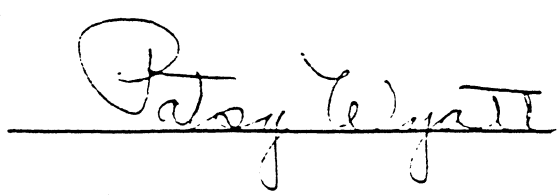
By_____
Honorable David S. Young
District Judge

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Judgment was mailed, postage prepaid, on March 14, 1990, to the following:

Roy A. Jacobson, Jr.
V. Anthony Vehar
Vehar, Beppler, Jacobson, Lavery & Rose
P. O. Box 189
Kemmerer, WY 83101

Wallace R. Lauchnor
Richards, Brandt, Miller & Nelson
50 South Main #700
Salt Lake City, Utah 84144



Tab A

WALLACE R. LAUCHNOR
Moffat, Paulsen, Lauchnor & Young
Attorneys for Plaintiffs
Suite 300
261 East Broadway
Salt Lake City, Utah 84111
Telephone: 521-7500

Defendant's Address:
Roger C. Day
Utah Insurance Department
160 East 300 South
Salt Lake City, Utah 84111

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---oooOooo---

ROBERT KENT HILL, individually and as personal representative of the heirs of TAMARA ELAINE HILL, deceased, and LORIN DEAN CALDWELL, individually and as personal representative of the heirs of TROY NEIL CALDWELL, deceased,

Plaintiffs,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.

COMPLAINT

Civil No. C83-8099

---oooOooo---

The Plaintiffs, for cause of action against the Defendant, allege as follows:

1. That Plaintiff, Lorin Dean Caldwell, had an insurance policy with the Defendant, insuring an automobile owned by said Defendant, on or about the 6th day of June, 1982, and that said insurance coverage provided by the Defendant on said

0000002

LAW OFFICES OF
MOFFAT, PAULSEN, LAUCHNOR & YOUNG
A PROFESSIONAL CORPORATION
SUITE 300
261 EAST BROADWAY
SALT LAKE CITY, UTAH 84111

automobile included collision damage coverage.

2. That the Defendant is an insurance company licensed to do business within the State of Utah and the Plaintiffs are residents of the State of Utah.

3. That on or about the 6th day of June, 1982, at or near the intersection of 3900 South Street, where the same intersects with 700 East Street, in Salt Lake County, State of Utah, a vehicle owned by Plaintiff, Lorin Dean Caldwell and insured by the Defendant, was involved in an automobile accident with a vehicle being driven by Kenneth Paul Bryan, and insured by the Cumis Insurance Society, Inc.

4. That said collision was caused by the negligence and intoxication of the Defendant driver, Kenneth Paul Bryan.

5. That as a direct and proximate result of the negligence and intoxication of the said driver, the driver of the vehicle insured by the Defendant and son of Plaintiff, Caldwell was killed by said collision and at the time of his death was a minor under the age of eighteen (18) years.

6. That as a further direct and proximate result of said collision, the Plaintiff, Robert Kent Hill, suffered the loss of his daughter, who was accidentally killed while riding in the automobile with the minor decedent, Caldwell, as a passenger at the time of said accident.

LAW OFFICES OF
MOFFAT, PAULSEN, LAUCHNOR & YOUNG
A PROFESSIONAL CORPORATION
SUITE 300
261 EAST BROADWAY
SALT LAKE CITY, UTAH 84111

LAW OFFICES OF
MOFFAT, PAULSEN, LAUCHNOR & YOUNG
A PROFESSIONAL CORPORATION
SUITE 300
261 EAST BROADWAY
SALT LAKE CITY, UTAH 84111

7. That neither the driver or the passenger of the Caldwell vehicle was negligent in any manner in causing said accident.

8. That as a direct and proximate result of said accident the above-named Plaintiffs brought suit against Kenneth Paul Bryan and others for the wrongful death of the above-named minors.

9. That as a result of said accident, the automobile of Plaintiff, Lorin Dean Caldwell, was damaged in the sum of $5,510.

10. That the Defendant driver, Kenneth Paul Bryan, was driving an automobile insured by the Cumis Insurance Society, Inc., with a single limit insurance coverage on the automobile in the amount of $50,000.

11. That the wrongful deaths of the Plaintiffs' children exceeded in value the sum of $25,000 per wrongful death, or a total of $50,000, as insurance afforded by the single limit policy aforementioned.

12. That the above-named Plaintiffs arrived at a compromise solution and settlement with the driver of the vehicle causing said accident in the sum of the policy limits of $50,000, but were unable to conclude their settlement of the litigation because the above-named Defendant failed and refused, and still

LAW OFFICES OF
MOFFAT, PAULSEN, LAUCHNOR & YOUNG
A PROFESSIONAL CORPORATION
SUITE 300
261 EAST BROADWAY
SALT LAKE CITY, UTAH 84111

refuses to acknowledge that there was insufficient insurance coverage to satisfy the entire claim of the Plaintiffs, and has demanded that the sum of $5,510 in collision payment made to Lorin Dean Caldwell be reimbursed to the Defendant out of the insurance policy limits of the driver of said vehicle causing said accident.

13. That Defendant State Farm Mutual Automobile Insurance Company failed to join in said litigation and refused to cooperate in settlement of said litigation by the Plaintiffs for the insufficient funds afforded by the insurance coverage evidencing bad faith toward its insureds in attempting to settle said litigation (emphasis added).

14. That Plaintiffs investigated the feasibility of litigation and possible recovery against the Defendant driver, independent of the insurance coverage and determined that said driver was insolvent.

15. That Plaintiffs have in their possession a check drawn by the Cumis Insurance Society, Inc. in the sum of $5,510 payable to the Defendant and its insured Lorin Dean Caldwell.

WHEREFORE, Plaintiffs pray that the Defendant be required to endorse said check payable to the Plaintiffs for the $5,510 remaining unpaid on the death claim of the Plaintiffs as personal representatives of said minor decedents, that

Plaintiffs recover their attorney's fees in a reasonable sum to be determined by the court herein, together with punitive damages for bad faith in obstructing settlement of Plaintiffs' claim against a tort feasor and causing unnecessary litigation where it is obvious that the insurance coverage afforded by the tort feasor's vehicle was inadequate to satisfy said death claims, together with Plaintiffs' costs of suit incurred herein, and such other and further relief as the Court deems proper in the premises. (emphasis added)

DATED this _____ day of November, 1983.

MOFFAT, PAULSEN, LAUCHNOR & YOUNG

Wallace R. Lauchnor
Attorney for Plaintiffs

Plaintiffs' Address

261 East Broadway, Suite 300
Salt Lake City, Utah 84111

LAW OFFICES OF
MOFFAT, PAULSEN, LAUCHNOR & YOUNG
A PROFESSIONAL CORPORATION
SUITE 300
261 EAST BROADWAY
SALT LAKE CITY, UTAH 84111

Tab B

R. Scott Williams, 3498
Strong & Hanni
Attorneys for Defendants
Sixth Floor Boston Building
Salt Lake City, UT 84111
Telephone: (801) 532-7080

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ROBERT KENT HILL, et al.,		
Plaintiffs,	:	COUNTER CLAIM
vs.	:	CIVIL NO. C83-8099
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	:	Judge Judith M. Billings
Defendant.		

Defendant, State Farm Mutual Automobile Insurance Company for it's Counter Claim against plaintiff alleges as follows:

1. Plaintiffs are residents of Salt Lake County, State of Utah.

2. Plaintiff Caldwell had an insurance policy with defendant, insuring an automobile owned by Caldwell, on or about the sixth day of June, 1982, and that the insurance coverage provided by defendant on said automobile included collision damage coverage.

3. That on or about the 6th day of June, 1982, at or near the intersection of 3900 South Street and 700 East Street, the said vehicle owned by plaintiff Caldwell and insured by defendant, was involved in an automobile accident with a vehicle driven by Kenneth Paul Bryan, and insured by Cumis Insurance Society, Inc.

4. As part of the insurance policy between plaintiff Caldwell and defendant, defendant paid plaintiff Caldwell approximately $5,510.00 under it's collision coverage for damage done to Caldwell's vehicle.

5. Under the terms of the above referenced policy of insurance, defendant was subrogated to all of the insured's rights of recovery and the insured was required to do whatever is necessary to secure such rights and to do nothing to prejudice such rights of subrogation.

6. That plaintiffs, on behalf of their deceased children, without the knowledge of defendant, filed suit against Kenneth Paul Bryan and or entered into settlement negotiations with Cumis Insurance Society, Inc., for claims of wrongful death.

7. Without the knowledge or consent of defendant, plaintiffs settled their claims against Bryan and signed complete and full Releases in favor of Bryan.

8. Plaintiffs executed said complete and full Releases with knowledge that State Farm had paid $5,510.00 in favor of plaintiff Caldwell under the collision portion of the

insurance policy and that State Farm had a subrogation right against Bryan.

9. By signing said Releases, plaintiffs prejudiced the subrogation rights of defendant and thereby breached the insurance contract with defendant, and defendant is entitled to damages by reason of said breach in the amount of $5,510.00, it's subrogation claim against Bryan.

10. Plaintiff Caldwell as part of the Release signed in favor of Bryan, acknowledged that $5,510.00 of the consideration being received by Caldwell for the Release was for property damage incurred to Caldwell's vehicle, and by such acknowledgement Caldwell specifically itemized that amount of the settlement funds as reimbursement for property damage, for which Caldwell had already been reimbursed by defendant State Farm.

11. That Caldwell is not entitled to be reimbursed twice for the property damage he suffered as a result of the accident, and that by itemizing the $5,510.00 as reimbursement for property damage, plaintiffs are bound to deliver that said $5,510.00 to defendant, under it's subrogation rights against Bryan.

WHEREFORE, defendant prays for judgment against plaintiffs in the amount of $5,510.00, for costs of court incurred, interest, and for such other and further relief as to the court seems just and equitable.

Dated this _____ day of _____ , 1984.

STRONG & HANNI

By_____
R. Scott Williams

CERTIFICATE OF HAND DELIVERY

I hereby do certify that on the 22nd day of June, 1984, that true and correct copies of the Counter Claim were hand delivered to the following:

Mr. Wallace Lauchnor
CSB Tower
50 South Main Street
Salt Lake City, UT 84144

_____

R. Scott Williams, 3498
Strong & Hanni
Attorneys for Defendants and
Third Party Plaintiffs
Sixth Floor Boston Building
Salt Lake City, UT 84111
Telephone: (801) 532-7080

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ROBERT KENT HILL, et al.,

Plaintiffs,

vs.

STATE FARM INSURANCE AUTOMOBILE INSURANCE COMPANY,

Defendant,

STATE FARM INSURANCE AUTOMOBILE INSURANCE COMPANY,

Third Party Plaintiff,

vs.

KENNETH PAUL BRYAN,

Third Party Defendant.

THIRD PARTY COMPLAINT

CIVIL NO. C83-8099

Judge Judith M. Billings

Third party plaintiff, State Farm Mutual Automobile Insurance Company, for it's Third Party Complaint against Kenneth Paul Bryan alleges as follows:

1. That Third Party Defendant is a resident of Salt Lake County from the State of Utah.

2. A Complaint has been filed against third party plaintiff by Robert Kent Hill and Loren Dean Caldwell, individually and as personal representatives of Tamera Elaine Hill, deceased, and Troy Neil Caldwell, deceased, respectively, in which the said plaintiffs make certain claims against third party plaintiff relating to the settlement of the said plaintiff's claims against the third party defendant.

3. The plaintiff's claims arise out of an accident which occurred on or about the 6th day of June, 1982, at or near the intersection of 3900 South and 700 East in Salt Lake County, State of Utah, involving a vehicle owned by plaintiff Caldwell, and a vehicle driven by third party defendant.

4. The third party plaintiff insured the vehicle owned by plaintiff Caldwell and provided collision coverage on said vehicle.

5. As a result of the accident involving the Caldwell vehicle and the vehicle driven by third party defendant, third party plaintiff provided approximately $5,510.00 to it's insured, plaintiff Caldwell, for collision damage incurred as a result of the above specified accident.

6. Third party plaintiff is subrogated to the rights of it's insured against third party defendant to the extent of the payments made by the third party plaintiff to it's insured for property damage caused by the above specified accident.

7. That on information and belief, the accident caused to the Caldwell vehicle was a direct and proximate result of the negligence and/or other misconduct of the third party defendant, and in the event Judgment is entered in favor of plaintiffs against third party plaintiff with respect to $5,510.00 of the settlement proceeds from the settlement of plaintiff's claims against the third party defendant, then third party plaintiff is entitled to the indemnified and is entitled to judgment over and against the third party defendant for the full amount of the judgment, if any awarded to plaintiffs and against third party plaintiff.

WHEREFORE, third party plaintiff prays for judgment against third party defendant in the amount of any judgment entered in favor of plaintiff and against third party plaintiff, for costs of court incurred thereon, interest, and for such other and further relief as to the court seems just and equitable.

Dated this _____day of _____, 1984.

STRONG & HANNI

By_____
R. Scott Williams

CERTIFICATE OF HAND DELIVERY

I hereby do certify that on the 22nd day of June, 1984, that true and correct copies of the Third Party Complaint were hand delivered to the following:

Mr. Wallace Lauchnor
CSB Tower
50 S. Main Street
Salt Lake City, UT 84144

Tab C

Glenn C. Hanni, A1327
R. Scott Williams, 3498
STRONG & HANNI
Attorneys for Defendant &
Third-Party Plaintiff
Sixth Floor Boston Building
Salt Lake City, Utah 84111
Telephone: (801) 532-7080

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ROBERT KENT HILL, et al., Plaintiffs,	:	
vs.	:	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant and Third-Party Plaintiff,	:	MOTION FOR SUMMARY JUDGMENT
	:	Civil No. C83-8099
vs.	:	Judge Judith M. Billings
KENNETH PAUL BRYAN, Third-Party Defendant.	:	

Pursuant to Rule 56, Utah Rules of Civil Procedure, State Farm moves this court for summary judgment as to plaintiffs' claims against State Farm and also as to plaintiffs' counterclaim against defendant on the grounds that there are no genuine issues of any material fact and that State Farm is

entitled to judgment as a matter of law.

Dated this ~~10th~~ 12th day of September, 1984.

STRONG & HANNI

By /s/
Glenn C. Hanni
R. Scott Williams
Attorneys for Defendant &
Third-Party Plaintiff

CERTIFICATE OF HAND DELIVERY

I hereby certify that on this ~~10th~~ 12th day of September, 1984, true and correct copies of the foregoing Motion for Summary Judgment were hand delivered to:

Wallace Lauchnor, Esq.
CSB Tower, Suite 300
50 South Main Street
Salt Lake City, Utah 84144
Attorney for Plaintiffs

J. Anthony Eyre, Esq.
Kipp & Christian
600 Commercial Club Building
Salt Lake City, Utah 84111
Attorneys for Third-Party
Defendant

0000095

Tab D

1721

Call et. Tab & See
if Signed & Entered &
Call & Return &
Meet WL
do not Hold Post

GLENN C. HANNI, A1327
R. SCOTT WILLIAMS, 3498
STRONG & HANNI
Attorneys for Defendant and
Third-Party Plaintiff
Sixth Floor Boston Building
Salt Lake City, Utah 84111
Telephone: (801) 532-7080

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,

STATE OF UTAH

Monday oct 29
WL

ROBERT KENT HILL, individually and as personal representative of the heirs of TAMARA ELAINE HILL, deceased, and LORIN DEAN CALDWELL, individually and as personal representative of the heirs of TROY NEIL CALDWELL, deceased,

Plaintiffs,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Third-Party Plaintiff,

vs.

KENNETH PAUL BRYAN,

Third-Party Defendant.

J U D G M E N T

Civil No. C83-8099

Honorable Judith M. Billings

0000135

On September 28, 1984, this matter came on for hearing before the Honorable Judith M. Billings, one of the judges of the above-entitled court, on motion for summary judgment of defendant State Farm, and on motion for summary judgment of third-party defendant Kenneth Paul Bryan. Plaintiffs were represented by their attorney, Wallace R. Lauchnor. Defendant State Farm was represented by its attorney, Glenn C. Hanni of the firm of Strong & Hanni. Third-party defendant was represented by his attorney, Heinz J. Mahler of the firm of Kipp and Christian.

It was stipulated by plaintiffs and defendant State Farm that a copy of the depositions that have been taken in this case could be used with the same force and effect as the original.

The court having heard arguments of counsel and being fully advised,

IT IS ORDERED, ADJUDGED AND DECREED:

1. State Farm's Motion for Summary Judgment is hereby granted and judgment is hereby entered on plaintiffs' complaint in favor of defendant State Farm and against plaintiffs and all of them, no cause of action.

2. Defendant State Farm's Motion for Summary Judgment on its counterclaim against plaintiffs is hereby granted and judgment is hereby entered in favor of State Farm Mutual Automobile Insurance Company and against plaintiff, Lorin Dean Caldwell, for the sum of $5510.00 with interest on said sum at the rate of 10% per annum from March 16, 1983, being the date that Cumis Insurance Society, Inc. delivered its check to plaintiff,

Lorin Dean Caldwell, which said check was payable to defendant State Farm and Lorin Dean Caldwell, to the date hereof, making a total judgment in favor of State Farm and against plaintiff, Lorin Dean Caldwell of Six Thousand Three Hundred Ninety Three and 11/100 Dollars ($6,393.11) together with costs in the amount of $_____. This judgment shall bear interest at the rate of 12% per annum from the date hereof until paid.

3. Plaintiff, Lorin Dean Caldwell, shall forthwith endorse said Cumis Insurance Society, Inc. check and shall deliver the same to counsel for defendant State Farm.

4. The motion of third-party defendant, Kenneth Paul Bryan, for summary judgment is hereby granted and judgment is hereby entered in favor of Kenneth Paul Bryan and against State Farm Mutual Automobile Insurance Company on the third-party complaint, no cause of action.

Dated this 22nd day of October, 1984.

BY THE COURT:

/s/
Honorable Judith M. Billings, Judge

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

PATSY WYATT, being duly sworn, says:

That she is employed in the offices of Strong & Hanni, Attorneys for Defendant and Third-Party Plaintiff State Farm Mutual herein; that she served the attached proposed Judgment

upon all counsel

by placing a true and correct copy thereof in an envelope addressed to:

Wallace Lauchnor
Attorney for Plaintiffs
CSB Tower
50 South Main Street
Salt Lake City, Utah 84101

Heinz J. Mahler
Attorney for Third-Party Defendant
600 Commercial Club Building
Salt Lake City, Utah 84111

and depositing the same, sealed, with first class postage prepaid thereon, in the United States mail at Salt Lake City, Utah, on the 16th day of October, 1984.

Patsy Wyatt

Subscribed and sworn to before me this 16th day of October, 1984.

Florence K. Nebeker
Notary Public
Residing at Salt Lake City, Utah

My commission expires:

5/13/85

0000136

GLENN C. HANNI, A1327
R. SCOTT WILLIAMS, 3498
STRONG & HANNI
Attorneys for Defendant and
Third-Party Plaintiff
Sixth Floor Boston Building
Salt Lake City, Utah 84111
Salt Lake City, Utah 84111
Telephone: (801) 532-7080

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,

STATE OF UTAH

ROBERT KENT HILL, individually and as personal representative of the heirs of TAMARA ELAINE HILL, deceased, and LORIN DEAN CALDWELL, individually and as personal representative of the heirs of TROY NEIL CALDWELL, deceased,

Plaintiffs,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Third-Party Plaintiff,

vs.

KENNETH PAUL BRYAN,

Third-Party Defendant.

NOTICE OF ENTRY OF JUDGMENT

Civil No. C83-8099

Honorable Judith M. Billings

TO THE PLAINTIFFS AND TO THEIR ATTORNEYS:

You will please take notice that judgment was entered in the above case in favor of defendant State Farm Mutual Automobile Insurance Company and against plaintiffs on the 22nd day of October, 1984, by the above-entitled court.

Dated this 1st day of November, 1984.

STRONG & HANNI

By_____
Glenn C. Hanni
Attorneys for Defendant State Farm

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

PATSY WYATT, being duly sworn, says:

That she is employed in the offices of Strong & Hanni, Attorneys for Defendant and Third-Party Plaintiff State Farm Mutual herein; that she served the attached Notice of Entry of Judgment

upon all counsel

by placing a true and correct copy thereof in an envelope addressed to:

Wallace Lauchnor
Attorney for Plaintiffs
CSB Tower
50 South Main Street
Salt Lake City, Utah 84101

Heinz J. Mahler
Attorney for Third-Party Defendant
600 Commercial Club Building
Salt Lake City, Utah 84111

and depositing the same, sealed, with first class postage prepaid thereon, in the United States mail at Salt Lake City, Utah, on the 1st day of November, 1984.

Subscribed and sworn to before me this 1st day of November, 1984.

Notary Public
Residing at Salt Lake City, Utah

My commission expires:
5/13/85

Tab E

Fil

WALLACE R. LAUCHNOR, No. 1905
Attorney for Plaintiff
CSB Tower, Suite 500
50 South Main Street
Salt Lake City, Utah 84144
Telephone: 521-7500

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ROBERT KENT HILL, et al., Plaintiff, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant and Third-Party Plaintiff. vs. KENNETH PAUL BRYAN, Third-Party Defendant.	NOTICE OF APPEAL CIVIL NO. C83-8099

Plaintiffs hereby appeal to the Utah Supreme Court from the Summary Judgment entered herein in favor of Defendant, State Farm Mutual Automobile Insurance Company and against the Plaintiffs.

DATED this 19 day of November, 1984.

Wallace R. Lauchnor
Attorney for Plaintiffs

Tab F

CERTIFIED COPY

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * *

ROBERT KENT HILL, et al.,	:	
	:	
Plaintiffs,	:	Civil No. C83-8099
	:	Judge Judith M. Billings
-vs-	:	
	:	Deposition of:
STATE FARM INSURANCE AUTOMOBILE INSURANCE COMPANY,	:	LORIN DEAN CALDWELL
	:	
Defendant.	:	
	:	
STATE FARM INSURANCE AUTOMOBILE INSURANCE COMPANY,	:	
	:	
Third Party Plaintiff,	:	
	:	
-vs-	:	
	:	
KENNETH PAUL BRYAN,	:	
	:	
Third Party Defendant.	:	

* * *

BE IT REMEMBERED that on the 8th day of August, 1984, the deposition of LORIN DEAN CALDWELL, produced as a witness herein at the instance of the defendant and third party plaintiff, herein, in the above-entitled action now pending in the above-named court, was taken before BRAD J. YOUNG, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, commencing at the hour of 1:15 p.m. of said day at the offices of STRONG & HANNI, Sixth Floor Boston Building, Salt Lake City, Utah.

That said deposition was taken pursuant to notice.

* * *

BRAD J. YOUNG
Associated Professional Reporters
420 Kearns Building
Salt Lake City, Utah 84101
Telephone: 322-3441

A P P E A R A N C E S

For the Plaintiffs: WALLY LAUCHNOR
PAULSEN, LAUCHNOR & DAVIS
Attorneys at Law
50 South Main Street
Salt Lake City, Utah 84144

For the Defendant and Third Party Plaintiff: R. SCOTT WILLIAMS
STRONG & HANNI
Attorneys at Law
Sixth Floor Boston Building
Salt Lake City, Utah 84111

Also Present: Janet Hill
Robert Hill
LaRue Caldwell

* * *

I N D E X

* * *

E X H I B I T S

* * *

P R O C E E D I N G S

LORIN DEAN CALDWELL,

called as a witness by and on behalf of the Defendant and Third-Party Plaintiff, being first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. WILLIAMS:

Q This is the deposition of Lorin Dean Dean Caldwell. The deposition is pursuant to notice, governed by the Utah Rules of Civil Procedure.

Would you state your name, please.

A Lorin Dean Caldwell.

Q Your present age?

A 55.

Q Date of birth?

A June 3, 1929.

Q Your address?

A 7311 Chris Lane.

Q How long have you lived there?

A 19 years.

Q That's in Salt Lake County?

A Yes.

Q You are married?

A Yes.

Q Your wife's name?

A Mary LaRue.
Q Have you ever had your deposition taken before?
A No.
Q Just so we understand each other -- and you have been obviously sitting in while I asked Mr. Hill questions, so you understand the procedure of a deposition; is that right?
A Yes, I guess I understand it.
Q If there is a question that I ask and you don't understand that question, please tell me so that I can rephrase it. Okay?
A Yes.
Q Otherwise, I will assume that you understand my questions. All right?
A Okay.
Q Tell me how many children you have presently.
A How many children I have living?
Q Yes.
A Four.
Q What are their ages, names and ages, if you can tell me, roughly?
A Colleen -- do you want their last name or the married?
Q Yes.
A Colleen Herriman, who is 31 -- 33.
Q She is married?
A Yes.

Q Her husband's name?
A Keith. They have two boys, two children. I have another daughter, Barbara Ann Romaro.
Q She is married?
A She is married and has three children.
Q Her age?
A Her age is 31.
Q What is her husband's name?
A Carl.
Q The other two?
A I have one, Chet Bryan. And he is 24.
Q Still living at home?
A No. He is married, living away from home. His wife's name is Wendy Humpherys.
Q And finally?
A And Todd. He is a twin brother of Troy.
Q So he is what?
A 19.
Q Is he living at home?
A Yes.
Q Is he in college?
A No. He is working.
Q Where is he working?
A Utah Power & Light.
Q Mr. Caldwell, I understand that you had a son Troy Neil

Caldwell; is that correct?

A That's right.

Q He was killed as a result of an accident on June 6, 1982; is that correct?

A That's right.

Q At the time of that accident he was how old, approximately?

A 16 -- 17.

Q Do you know his date of birth?

A May 7, 1965.

Q That particular night, the night of the accident, was he driving your vehicle?

A That's true.

Q You were the owner of a 1979 Honda?

A Yes.

Q Troy had his driver's license?

A Yes.

Q How long had he had it, do you remember?

A Probably several months. He got it when he was through the drivers education.

MRS. CALDWELL: He had a year and probably two months, three months.

MR. WILLIAMS: I think that as we go along in this deposition, the way it probably would help Brad the best is that you try to answer the question, and then if you need your

wife's help, ask for it, and then we will get it that way. Or I may direct some questions to you.

THE WITNESS: I might on my dates, a little bit.

Q (By Mr. Williams) How long had you owned that vehicle?

A Since 1979.

Q Can you tell me, just very briefly, your understanding as to how the accident happened? Then I will ask you a little bit about how you have gained that information.

A Actually how the accident happened?

Q Yes, as far as you understand it, very briefly.

A My son Troy and his girlfriend Tammy had went to a show at Trolley Corners. They was coming home on 7th East.

Q Going southbound?

A Going southbound on 7th East. They approached a red light at 39th South and 7th East. They was in the far outside lane, or the right lane. And they waited -- I am not sure whether -- how many other vehicles were there at the time, but as they proceeded through, as the light changed and they proceeded through the intersection, there was a four-wheel drive vehicle eastbound on 39th South at a high rate of speed, and hit them broadside in the middle of the intersection, and they was pushed from the impact all the way across 7th East and in front of the Arctic Circle hamburger place on the east side of 7th East.

Q Do you know the names of any witnesses to the accident?

A I have heard them but I do not recall who they are.
Q Have you ever talked with Kenneth Paul Bryan?
A No.
Q As you understand it, he was the party in the four-wheel drive vehicle?
A That is right.
Q Have you ever talked with his parents?
A No.
Q Has your wife ever talked with either Kenneth Bryan or his parents?
A Yes.
Q Did she relate to you what the results of those conversations were?
A Well, just the fact that she --
Q Let me ask you this, so we get the necessary background. How many times did she talk to them, do you know?
A Probably once to each one, to my knowledge.
Q Did she ever talk to Kenneth Paul?
A I don't know that she talked directly to him.
MR. WILLIAMS: Let me ask her. Did you ever talk with him?
MRS. CALDWELL: No.
Q (By Mr. Williams) So, as far as you know, she talked with the mother and the father on one occasion?
A I don't know that she talked to the father. I think she

talked to the mother only, as far as I know.

MR. WILLIAMS: Is that right?

MRS. CALDWELL: Yes.

Q (By Mr. Williams) Do you know when that conversation took place, in the chain of events? Was it early on or later on?

A Early on.

MR. WILLIAMS: Maybe I can shortcut this by asking Mrs. Caldwell a couple of questions.

MRS. CALDWELL: It was a few days after the death of Troy.

MR. WILLIAMS: Where did the conversation take place?

MRS. CALDWELL: I called her at her home, and wanted her to know what kind of a boy Troy was and Tammy was and what her son had done.

MR. WILLIAMS: Was there anything else said in the conversation?

MRS. CALDWELL: She said she was very sorry. She proceeded to tell me the tragic life that Paul had had, and she was very sorry for what he had done. And I told her that I felt like they had responsibility in that, too, because they knew that he did not have a driver's license, it had been revoked. He had been convicted of DUI's and they still let him drive their vehicle.

MR. WILLIAMS: Did she say that she or her husband had

actually given him permission to drive that car?

MRS. CALDWELL: They said they give him that truck because he had to have it to live in.

MR. WILLIAMS: Was there any discussion about the facts of the accident with her?

MRS. CALDWELL: No.

Q (By Mr. Williams) Back to you, Mr. Caldwell. Did you go to the hearing for the criminal matter?

A No.

Q Was it your understanding that Mr. Bryan was convicted of some offense?

A Yes.

Q Do you know what he was convicted of?

A I don't know what he was convicted of. Whatever it was, it was -- he was sentenced to a lesser charge.

MR. WILLIAMS: Mrs. Caldwell?

MRS. CALDWELL: They tried to get him on murder charges, which there had not been a case on this particular thing that they could charge because they said there was not intent of the person that was -- and so he was charged with manslaughter.

Q (By Mr. Williams) Do you understand that he is in prison at the present time?

A Yes.

Q I understand, Mr. Caldwell, that you were insured through

State Farm at the time of this accident; is that correct?
A That's correct.
Q And I understand that shortly after the accident you were paid some money by State Farm; is that right?
A Yes, that's true.
Q Again, as I understand it, they paid you approximately $5,600 for property damage?
A That is correct.
Q You had $100 deductible on the policy; is that correct?
A Yes.
Q There was also $5,000 paid for survivor benefits, wasn't there?
A Yes, that is true.
Q Did they also pay $1,000 for funeral expenses?
A I think that was correct, yes.
Q You didn't have any complaints, did you, about the timeliness of those payments?
A No.
Q After the accident, tell me what was the first thing you did in terms of talking to anyone to help you understand your rights against Mr. Bryan and his insurance company.
A As far as the insurance company?
Q Or rights against him, either one.
A We just went to the insurance company to see what we had to do.

Q That was CUMIS Insurance?
A No. We went to State Farm. We didn't know at that time who CUMIS even was.
Q Who did you talk to at State Farm?
A I talked to Clark Davis. He was the adjuster.
Q Who went with you?
A My wife was with me.
Q Were Mr. and Mrs. Hill with you?
A No, not at that time.
Q What was discussed about what you were entitled to, other than what State Farm was paying you?
A Well, they said that they would recoup for the loss of the damage -- for the automobile, and that was all at that time.
Q Did you talk to State Farm, with Mr. Davis at that time, about Mr. Bryan's insurance company or anything like that?
A Yes, I think I did.
Q What was said about that?
A I think at that time they told us that we would be paid for the loss of the automobile, which was around $5,600 or whatever it was. And that they was going to take money from the other insurance company to make themselves whole on the $5,600 that they was giving us.
Q As early as that first conversation with Clark Davis, he was telling you that?

A Yes.
Q What about the next contact? What was that? With anybody concerning trying to get some money from some source.
A Well, we probably went back to Clark. I am not sure just how the sequence went.
Q What happened in that conversation?
A Basically, the same thing. They told us that they would give us the money for the automobile, but as far as the death benefits and the funeral, they was going to recoup that out of the other insurance money. And at that time I felt real uneasy about it, to think that they would want to take the insurance money that was to go to us, and they was going to take their share out of that portion.
Q What did you know at that time about what insurance Mr. Bryan had and how much insurance?
A I don't know at that time whether we knew exactly how much that policy -- well, I think that we knew that his parents had the policy and that, but I am not sure whether we knew how much it was or anything like that.
Q What I am trying to get at, was there some contact with CUMIS before you talked with Clark Davis about those things?
A I guess there must have been. Like I say, I am not sure just how the events went.
MR. WILLIAMS: I think your wife wants to make a comment.

MRS. CALDWELL: Mr. Winget from CUMIS Insurance was out at our home, probably four days after the accident, with this one paper, wanting us to sign for that $25,000 for us and $25,000 for Hills. He came to our home with that. And then my husband went back. Then State Farm, we talked to Clark Davis in the meantime, and he told us that would not be so because they were going to go back and recoup for the benefits that they had given us and the benefits they had given Hills. So we went back and talked to State Farm. That's when they told us they were going to recoup it all, this Mr. Clark Davis.

And my husband said he would like to speak to someone else in State Farm. So we talked to someone else. While we were in there, talking with them, they called, I guess, back East or somewhere and told us at that time that they would not take, recoup the death benefits that they had given the Hills and that they had given us, that they did want their money for the automobile.

Q (By Mr. Williams) Mr. Caldwell, do you remember that initial visit where Greg Winget came to your home?

A Yes.

Q In that conversation with him, do you remember that he offered you essentially $25,000?

A I think that at that time, yes, that they wanted to settle.

Q Did he present in front of you a release at that time, for you to sign for the money?
A I think they wanted us to sign the release. As I recall, we wanted to get some legal advice or something before we signed any papers or that.
Q Do you remember a meeting at CUMIS with Mr. and Mrs. Hill?
A Yes.
Q Was that about three weeks after the accident?
A I guess.
Q It could have been?
A Yes.
Q Was money offered to you at that time?
A I am not sure. I think that it could have been, but, like I say, there was so much going on at that time, one thing and another, I was, I guess, kind of confused as to whether they wanted to -- I think also at that time that they had to have approval through their home office or something, in order to authorize payment or something like that. That took quite awhile.
Q Do you remember some question coming up about whether there was actually insurance coverage for this accident?
A Yes, there was. They said there was coverage. I think they stated it was $50,000 single --
Q Limit liability?
A That's total limit or whatever. Anyway, whatever it was.

Q When did you first contact an attorney?

MR. LAUCHNOR: I am not sure when it was.

Q (By Mr. Williams) How many months after the accident, approximately?

A I would say three months, but I don't know. I am not sure.

Q Who did you first contact? What lawyer did you make contact with?

A I think at that time the one that we contacted was Tom Crowther.

Q Was Dennis Haslam working for them at that time?

A Yes, that's right.

Q He became the one that --

A Was handling it, yes.

Q Did you have some specific questions for him or did you just generally want him to handle your case and take care of your interests?

A I guess we just wanted him to tell us just through the legal advice, as to what is best. How do you pursue the thing?

Q Did you have any additional meetings with anybody from CUMIS at that earlier time period, within the first three or four months?

A We might have had one other one, as far as I recall.

Q Was there anything that happened in that other contact

that is different from what you have told me?
A I think at that time they said that there was a third party or something that wanted part of that money.
Q Meaning who?
A Meaning State Farm.
Q Your memory is that CUMIS was telling you that State Farm wanted their money as early as three or four months after the accident?
A I am not sure just what the time frame was.
Q What did CUMIS say about that, in general terms? I assume we are talking about Greg Winget; is that correct?
A That's correct, Greg Winget and Cornevaux or whatever her name was, Mary.
Q What did he or she say about State Farm's interest?
A Well, I think at that time they just was indicating that State Farm was in for their money that they had paid us, and they wanted to recoup that money. Of course, I told them that that was a bunch of nonsense, that they wasn't entitled to that. If in fact they wanted to pursue the thing, they could go a different route, rather than taking the money that was to be paid out on insurance.
Q Were Mr. and Mrs. Hill present with you at that time?
A I think they was, yes.
Q Had you obtained an attorney by the time that you were talking with Mr. Winget on this last occasion you were telling

me about?
A I don't remember whether it was then or a little later.
Q From what source did you get the information that you had that told you State Farm was not entitled to that money?
A My own judgment.
Q Just common sense or something?
A Yeah, I guess.
Q Did you read the policy for your -- your own insurance policy, for example? Did you do that?
A I don't know how you read a policy, like I am, and come out with anything that you can understand. I just --
Q Okay. Did you ask your attorney, Dennis Haslam, about that question, whether State Farm was entitled to some of that money or not?
A Probably in the conversation, we -- that question probably came up, yes.
Q What did he say?
A I don't recall.
Q After you went to Mr. Haslam, what happened next in the chain of events that was part of your effort to pursue a claim against Bryan and his insurance company?
A I guess they pursued the thing to see if maybe we could maybe recoup some money through his insurance, through the place where Mr. Bryan was drinking, which was --
Q It was a bar?

A A bar on State Street and about 40th South. They also wanted to pursue, I guess, what they call the Dram Shop Act or whatever it is. I am not too familiar with that.
Q Was your attorney investigating the assets of Mr. and Mrs. Bryan, as far as you know?
A I think they did, yes.
Q He was also looking into the Dram Shop Act, the possibility of that kind of a case against the bar?
A Yes.
Q How long did this investigation go on, approximately?
A Well, it went on for a few months. I am not sure just what it was, but it was several months that it went on.
Q What was the next event or contact that took place?
A I think after they was satisfied that they pursued all avenues that they thought they could, they said at that time that they didn't think there was anything that was available through the Dram Shop Act, through Mr. Brown, the fellow that served Mr. Bryan. And he didn't have any insurance. I don't know whether he actually owned the bar or whether he was just managing it or what. But there was no insurance there.
Q So the problem was lack of assets for the bar to make it worth pursuing?
A I guess, yes.
Q Is that what Mr. Haslam told you?
A Yes.

Q Did you ever file -- did Mr. Haslam on your behalf ever file a lawsuit, do you know?
A I don't know whether they did or not. I don't think they did.
MR. WILLIAMS: Mrs. Caldwell?
MRS. CALDWELL: I think that there was. The suit was brought against -- but we never actually went to court on it.
Q (By Mr. Williams) Did you have an attorney fee arrangement with Mr. Haslam?
A Ours was just on just -- they was going to take a percentage or whatever, I guess.
Q Was it like Mr. Hill's arrangement, where you were to pay him a percentage of what he was able to get over the $25,000? Do you understand what I am saying? Let me back up and see if we can explain that. There was an offer already from CUMIS to pay you $25,000.
A Uh-huh (affirmative).
Q Did Mr. Haslam, after you employed him, intend to take any of that $25,000 as part of his fee?
A I don't think so, no.
Q If he was to get any contingency fee, it was from money that was collected in addition to that $25,000?
A Right.
Q Since there was no effort to pursue that case, I assume Mr. Haslam didn't get paid anything; is that correct?

A The only thing we paid him was some money for what they call, what, in-office expense or whatever.
Q Can you give me a time frame, approximate date or year that Mr. Haslam told you the case isn't worth pursuing?
A No.
Q Was it within the first six months after the accident or after that, do you know?
A Probably within the first six months.
Q I assume that during this time the investigation was going on, you were communicating with Mr. Hill; is that correct?
A That's right.
Q Were you talking about the merits of pursuing a lawsuit together?
A I don't know that we was talking about a lawsuit. I think all we were talking about was trying to collect the money that we felt was ours, that should have been coming to us through the insurance companies.
Q Is it true and correct, as Mr. Hill has testified, that before you got your lawyers involved it was your decision not to take at that point in time the $25,000 that they had offered you?
A Yes, that's right.
Q You were intending to investigate the case before you decided to sign a release?

A I think that's probably true, yes.
Q At some point in time you wanted the insurance company now to pay you the money, $25,000; is that correct? The investigation was complete. Now you wanted the company to pay you the money?
A Yes.
Q What was the first contact you had with CUMIS to give them that understanding? Did you go in and talk to Mr. Winget?
A As I recall, that's what we did, is either went in and talked to him or over the phone or something.
Q Do you remember a meeting with him after your lawyer had finished the investigation?
A I remember two or three different meetings but I can't tell you exactly the time frame of when they was.
Q Were you always present with the Hills at those meetings?
A Not always.
Q Sometimes you met with Mr. Winget alone?
A I think the first time we was alone, as far as I remember it. But I am not sure.
Q That was when he came to your house?
A Well, yes.
Q Did you ever go out there to his office alone, just you and your wife?
MRS. CALDWELL: I don't think so.
THE WITNESS: Maybe not. I don't remember.

Q (By Mr. Williams) On the first meeting after your lawyer told you the case isn't worth pursuing, on this first meeting with CUMIS, after that -- I am trying to key into some events -- tell me what happened in terms of the discussions in that meeting.
A I can't tell you exactly what took place in that meeting.
Q Do you remember wanting to settle the case at that time?
A Yeah, we wanted to settle the case right from the start. But we didn't want to settle it on their terms.
Q What were their terms at that time?
A Their terms was that State Farm wanted part of that money.
Q For the reimbursement of the property damage?
A That's right, yes.
Q Did CUMIS tell you that's the way it had to be done?
A They told us that's the way -- I guess they told us that's the way it had to be done. I am not sure whether they said it had to or not. But there was the third party involved.
Q You were unwilling to accept that?
A Yes.
Q At that time had you sought legal advice about whether that was an appropriate thing to do?
A I don't remember at what time frame that we sought Wally Lauchnor's help. I am not sure when it was.
Q Mr. Hill was of some value because he was doing some legal research?

A That's true.
Q I guess you were relying to a certain extent on what he was telling you?
A That's true, yes.
Q Mr. Caldwell, after this meeting with CUMIS, where they told you they are not going to release the money without also paying State Farm, what did you do at that time? Did you go to Mr. Lauchnor or was there something else that happened before that?
A I think that's probably when we went to Wally, through some -- I don't remember who it was that referred us to Wally.
MR. LAUCHNOR: Probably Brett Paulsen in the office.
THE WITNESS: I guess that's who it was, yeah.
Q (By Mr. Williams) You met with Mr. Lauchnor and told him the problem, and I assume that you then left it in his hands; is that correct?
A That is true, yes.
Q Then do you remember a time when you were told that the money could be paid with certain reservations?
A I think that that was true, yes.
Q You had a meeting where you were presented with a settlement agreement or with a release?
A Yes.
MR. WILLIAMS: Let's mark this as an exhibit.
* * *

(Defendant's Exhibit 1 was marked for identification.)

Q (By Mr. Williams) Let me show you what has been marked as Exhibit 1, and ask you if you recall seeing that document before or a copy of it?

A This is probably the one, as far as I can determine.

Q That appears to be the release that you were presented with by the attorneys for CUMIS?

A Yes.

Q You understand that your lawyer had participated in negotiating for that release?

A Yes.

Q Did you sign this document?

A I guess I did. At that time I didn't know what I was signing or anything else. I must have signed it, yes.

Q Did you read the document before you signed it?

A Yeah.

Q Did your wife sign it?

A To my knowledge, yes.

MR. WILLIAMS: You did sign it, didn't you?

MRS. CALDWELL: I think so, yes.

Q (By Mr. Williams) Did you ask your lawyer to help you understand the release?

A Yes, I guess.

Q Did he do that?

A Yes.
Q Did you feel like when you signed this document that you knew what it meant?
A Yeah.
Q I guess by signing the agreement you intended that there were no other terms or understandings with CUMIS, other than what is in this agreement. Is that a fair statement?
A We was just going on our -- the lawyer's advice that we should sign it.
Q Was there anything that was part of your understanding that was not contained in this document, as far as you know?
A No.
Q By signing this agreement you intended that, as it says, $27,755 was to be paid to you, but that approximately $5,500 was to be kept out for property damage?
A Yes, that's right.
Q And that that would be a dispute as to who gets that between you and State Farm?
A Yes.
Q At the time you signed this agreement, were you aware of the rights of State Farm to pursue what you have called a recoupment of their money that they have paid for property damage?
MR. LAUCHNOR: I am going to object to the question as it calls for a legal conclusion as to what their rights are, and

instruct him not to answer.
Q (By Mr. Williams) Okay, I will ask it a different way. Did you have some kind of an understanding as to what kind of what we call subrogation rights State Farm had? Did you have some kind of an understanding about that?
A Well, they told me, I guess in the conversation, that they was going after that money, and at that time that's when I told them that I didn't think that they should pursue it in that direction.
Q Did you have some kind of an understanding from some source about, assuming State Farm didn't go after that money from the $50,000, that they could go after Mr. and Mrs. Bryan or their son for the money? Did you have any understanding about their rights to do that?
A That State Farm could go after them?
Q Yes.
A No, I didn't have any idea about that.
Q Your attorney didn't tell you about that?
A To my knowledge, he didn't. He might have, but I don't know.
Q Did anyone tell you that by signing that agreement State Farm wouldn't be able to do that?
A I don't think so.
Q Did you have an understanding about that one way or another?

A No.
Q Were there any discussions before you signed this document, Exhibit 1, with anyone from State Farm, other than the early contacts you have told me about?
A I don't recall whether there was or not.
Q You don't remember talking to Clark Davis about what State Farm's position was before the money was paid?
A Yeah, we talked to Clark Davis several times.
Q You understood he was with State Farm?
A That's right.
Q When was the last time that you talked with him about these matters?
A I don't know.
Q Was it before you signed this release document?
A Probably.
Q Tell me what was said in substance in that conversation, that last conversation.
A I can't tell you. I don't know. I don't remember.
Q Can you tell me generally what his position was?
A His position was that they was going to get part of that money from CUMIS.
Q What part?
A The part of the $50,000 on the policy.
Q Did you have a dispute with him about that?
A I sure did.

Q What was your position?
A My position was that they didn't have any right in that part of the money. In fact, I not only talked to Clark Davis but I asked to talk to his boss also.
Q Do you know who that was?
A His boss -- I can't remember what his name was.
Q Does Grant Cutler sound familiar?
A That name came up. But there was another name, Morgan. I am not sure whether it was Morgan or -- I don't remember what his boss' name was, but it was his boss.
Q Did you talk to that person, whoever it was?
A Yes, I sure did.
Q Was that in a meeting or a telephone call?
A That was in a meeting.
Q At State Farm?
A That's right.
Q Again, we are talking about -- correct me if I am wrong -- but a time period prior to the time you signed this release?
A That's right.
Q Whoever it was, the boss -- by the way, who else was present in that meeting? Was your wife?
A I think there was me and my wife and Clark and, as far as I remember, his boss.
Q What was said, in substance? Tell me their position.

A I have told you just what has been said before, that the fact remained that they wanted to pursue in getting money from CUMIS out of the $50,000 that was owed to us. And that's what Clark told us to begin with. And I insisted on having a meeting with his boss. And he rejected that at first. And I told him that I insisted on having a meeting with him.

Q When you say he rejected it, he didn't want you to talk to his boss?

A That's right. He wanted to handle the thing himself. I insisted on talking to him.

Q You were able to get the audience with the boss. What did the boss say?

A I think the boss read some documents or whatever and got on the phone and called the head office or whatever and said that's the way it was. I think at that time that they -- the $5,000 -- they paid us for the $5,600 for the automobile, and they said that they would go with the -- I think the death benefit, but as far as the other, that they would not -- they couldn't do it, that they was going after that money.

Q Was there a discussion by either Clark Davis or this fellow who was his supervisor -- was there some discussion about their rights to proceed against Paul Bryan or his parents?

A Well, I am not sure whether there was anything said as far as Paul Bryan or the parents. They was going -- as far as

I recall, it was after the insurance company and not them. To my knowledge. I don't remember.

Q Were there any discussions with anyone from State Farm concerning their getting involved to try to recover their money in the lawsuits that you were contemplating? Was there any discussion about that?

A Not that I know of.

Q At the time that you signed this release -- by the way, had your attorney explained what the terms of the release were going to be before you were invited to come in and sign it? Did you know in advance what you were going to be doing?

A Yes.

Q That was Mr. Lauchnor that explained that to you?

A Yes, I think so.

Q Did you ever contact anyone from State Farm to tell them what you were going to do?

A To my knowledge, no.

Q Do you know if your attorney did? Did he tell you that he had contacted State Farm?

A I am not sure. He might have done. But I don't remember.

Q You have alleged in your complaint that State Farm was aware of this agreement. Is that something that your attorney knows more than you do?

A I am sure.

(An off-the-record discussion was held.)

Q (By Mr. Williams) Were there any other contacts with anyone from CUMIS after this document was signed? Did you have any reason to go back and talk to them?

A After they had released the money?

Q Right.

A To my knowledge, no. For me, you mean? My personal?

Q Yes.

A No, I didn't talk to them.

Q I want to ask you some questions about Troy in the same manner that I asked about Tamara. Here, I will expect, we will be getting some help from Mrs. Caldwell. I just ask you to keep in mind that the reporter has to somehow make a note who is talking here. So we have to try to do this carefully.

Was Troy just going into his junior year at high school?

A Troy had just finished junior high and was going into senior class, the following year.

Q You mean sophomore class?

A He was going into his senior year. He was going to be a senior at Brighton High School the following year.

Q So he had not just finished junior high, he had finished his junior year?

A Yes.

Q You said junior high. That's what threw me off.

A Just finished his junior class.

Q He would have graduated in 1983?

A That's correct.
Q What type of student was he? What kind of grades did he get? Let's let Mr. Caldwell answer first.
A He was an "A" student.
Q Completely? Or did he get some "B's"?
A In my book, he was "A" all the way, but he might have got some "B's" in school.
MRS. CALDWELL: Troy's last report card was a 4.0, and I believe that is almost perfect.
MR. WILLIAMS: He didn't have a 4.0 average throughout high school?
MRS. CALDWELL: Three point eight.
Q (By Mr. Williams) Did he have some courses that he particularly liked more than others, that you were aware of?
A I am not sure just which ones that he liked better than the others.
Q Did he discuss with you some preferences for a career after he settled down?
A Yes. He had talked about after finishing high school maybe going on a mission, pursuing college, and even going in profession as a lawyer.
Q Did he have some other things that he talked about, besides being a lawyer? Did he have any other --
A Well, as all people do, I guess, they have other things that they talk about. But I think that was probably one of

the main things.

Q I should have asked you a couple of questions at the beginning. Let me just get those out now. In terms of your background, what is your educational background?

A High school.

Q Have you had some kind of a career that we can sort of throw all of your work experience into, or have you had varied jobs?

A I have had one career.

Q What is that?

A Utah Power & Light Company.

Q What do you do for them?

A I am a safety supervisor.

Q You have been with the company since when?

A 36 years.

Q Back to Troy. Was he engaged in some extracurricular activities at school?

A Football.

Q He was on the football team?

A Yes.

Q Was he on the varsity football team?

A Yes.

Q What position?

MRS. CALDWELL: Wide receiver.

THE WITNESS: Wide receiver.

Q (By Mr. Williams) Going into his senior year, would he, as far as you know, have been a starter for the team?
A Yes.
Q Was he playing varsity in his junior year?
A Yes.
Q Did he start for the team then?
A Certain games. He wasn't a starter all the time.
MR. WILLIAMS: You wanted to add something?
MRS. CALDWELL: He had been elected senior class president, president of his senior class.
MR. WILLIAMS: Any other clubs or activities that he was involved in?
MRS. CALDWELL: He played baseball. He was one of their good players for baseball. He played baseball for nine years. He played all while he was at Brighton High School.
MR. WILLIAMS: He was on the baseball team?
MRS. CALDWELL: Yes.
Q (By Mr. Williams) What position?
A Mostly right field.
Q Did he have any serious plans to pursue an athletic career?
A I don't think serious, no.
Q Have you told me just about all you can remember in terms of his extra activities at school?
A I think that's probably about it. He was top student,

was well-liked by everybody. He had the ability to converse with anybody that he come in contact with.

Q Had he received any special awards or achievements?

A I think in his grade school, he -- or junior high, maybe it was, he got an award. I don't remember what that was for.

MR. WILLIAMS: Do you remember?

MRS. CALDWELL: It was outstanding student of the month at Midvale Junior High School.

THE WITNESS: He had the ability to talk to a 70-year-old man or a 4-year-old child.

Q (By Mr. Williams) Was he active in scouting?

A Yes.

Q Had he achieved any ranks in scouting?

A He had went up -- was pursuing Eagle Scout.

Q Do you know how far along he was?

A I think he had several merit badges that he had to receive before he got his Eagle.

Q Was he a Life Scout?

MRS. CALDWELL: Is that the last one? He was a Life Scout.

THE WITNESS: I think he was, yes.

MR. WILLIAMS: We have to be careful here, again. We ran into that problem before.

Q (By Mr. Williams) You said he had some plans for going on a mission, or were those just possible plans?

A Those were definite plans.
Q He was active in the church?
A Yes, very much so.
Q Had he saved any money?
A He didn't have any saved at that time. But he was planning on saving. He was working for Stokes Brothers at the time of the accident. He helped them open up their new store on 10th East and 9400 South. He was, as I say, working for them at that time. He was very active in their organization.
Q What did he do for them?
A He was, I guess, just a stock boy, whatever you call them.
Q Had he worked for them before that summer?
A No.
Q He had just started?
A He had worked for Seaman James Bartley as a dishwasher and a -- what do you call it -- bus boy. He worked there for several years.
Q Part-time?
A Part-time, yes.
Q Back to my initial question, the money he had made had not been in any way set aside for whatever purpose in a savings account?
A No.
Q Did he have a checking account at the time of his death?

A No. I might make one other comment in regards to his work at Stokes Brothers. He was very meticulous in his work. He felt -- he was a boy that wanted to give eight hours work for eight hours pay. He went to work one Saturday, and was home in about three hours. We said, How come, Troy? How come you are not still working? He said, I got my work done. He said, There is no sense in me staying over here, drawing pay, when there isn't any work to do. He was that type. Mr. Stokes also made a comment that here is a boy that will go a long ways in this company.

Q As far as you are aware, did he, this early in his -- before his senior year, had he made any contacts with any colleges concerning entrance after he graduated?

A I don't think he had. To my knowledge, there was probably some stuff that came to the house, through the mail. But I am not sure just what it was.

Q Do you know if he had a specific college in mind that he was going to go to?

A I don't know, no.

MR. WILLIAMS: Mrs. Caldwell?

MRS. CALDWELL: I was going to say the boy that took over Troy's place as being president of the senior class, his mother came up to us at graduation and said that Troy really should be getting the scholarship her son got that night because it was given to the senior class president, and with

Troy's grades it was a full scholarship her son got that should have been Troy's.

Q (By Mr. Williams) Was he actively pursuing obtaining a scholarship for college entrance? Were you aware of his plans in that regard?

A Not as such, no.

Q In addition to what he was making part time and then full time that summer, did he obtain money from any other source, other than his parents?

A No.

Q You did provide some of his support?

A Yes.

Q Did he ever file any income tax returns for his employment?

A Yes.

Q Was there ever a reason for him to pay you money?

A Probably no reason. But several times, he would give us some money. Nothing, you know, no pattern set.

Q What was that for?

A He would come home and maybe give us $10 or $15 to help out with the food or whatever.

MRS. CALDWELL: His brother was on a mission and he felt like it was going to be a family, so each paycheck Troy would give $10 and his twin brother would give $10 to help his brother on his mission each month.

Q (By Mr. Williams) At the time Troy was killed, was his brother on a mission at that time?
A No.
Q Which brother went on a mission?
A Chet.
Q When did Chet get back?
A May.
MRS. CALDWELL: Six weeks before the accident.
THE WITNESS: It was just a few weeks before the accident. I might also say that both Troy and Tammy kept journals. I don't know how long Tammy kept a journal, but probably quite a few years. Troy, he kept one for two years prior to his death. He often wrote about things that would happen, like when President Reagan was shot. When my daughter had a miscarriage, his concern. How he loved life. How he loved Tammy. And just different things.
Q Were there any marriage plans discussed before he was killed, that you were aware of?
A No. If the plans for marriage, it would have been long-term, because they wanted to pursue their education and mission before anything happened.
Q Was Troy ever at any time in trouble with the law?
A No.
Q He had his driver's license at the time, I think you said?
A Yes.

Q He had not, however, got to the point where he could own his own car?
A That's true, financially.
Q Did he have any other property of substance, other than clothes and usual things?
A Motorcycle.
Q He did have a motorcycle?
A Yes.
Q Was it a dirt bike?
A Yes.
Q How long had he been riding that?
A Since he was eight years old.
Q Other than the contribution to help while his brother was on a mission, can you tell me some of the other things he did for the family that for which the whole family somehow got some benefits or which the parents got benefit for?
A Nothing, other than like I say, he was just a real generous and considerate boy.
Q Did he have some jobs that were assigned to him around the home?
A Yeah, I guess. Not definite assignments, but he helped around the house, yes.
Q You didn't have to get after him to help you with the yard or anything like that?
A No.

Q I guess he and Todd sort of were close?
A Very close.
Q How about the other kids? Did he have a good relationship with the other children?
A Yes, had a real good rapport with all of his brothers and sisters.
Q Did he stay with projects once he started them, pretty much?
A Yes.
Q Is there anything you would like to add about his personality that you haven't already told me about, that would help me understand it a little more?
A Nothing other than he was just a top-notch boy. He had the ability to read the paper or whatever it might be and glean things from what he read, and had a real good use. He had the ability to -- he knew what was going on.
Q You mean current events?
A Current events.
Q What kind of a relationship did you have with him personally?
A Real good relationship.
Q During the year before he died, did you spend some time with him alone?
A Yes.
Q How often, generally speaking?

A Oh, probably days, maybe two or three days, whatever, out of each month.
Q Were there things that you and he liked to do together?
A Yes.
Q Like what?
A We liked to play baseball together. We liked to ride motorcycles together. We done some fishing and some hunting together. Although, he liked to stay home with his mother when I would go hunting, he would usually like to stay home with mother. Him and his mother had a very close relationship. More so than any of the other children.
Q Did he have any health problems prior to his death?
A No.
Q Who were his closest friends before he died?
A Well, his brother was his closest, his twin brother.
Q Who else?
A Bill Holt and Ron Wade was, I guess, one of his closest.
Q Anybody else that comes to your mind?
A Well, he just had -- I guess everybody was his friend.
Q Any idea what Bill Holt is doing nowadays?
A Yes. Bill Holt is living at home and working. I don't know exactly where he works.
Q What is his father's name, do you know?
A Herbert.
MR. WILLIAMS: Mrs. Caldwell?

MRS. CALDWELL: Bill is one of the best players for U.S.C. College basketball.

THE WITNESS: He is going to school but he is home now.

Q (By Mr. Williams) S.U.S.C.?

A In Price.

Q That's College of Eastern Utah.

A Right. He is one of their top basketball players there.

Q And Ron Wade, do you know what he is doing?

A Ron Wade is on a mission.

Q Do you know which one?

MRS. CALDWELL: He is in Brazil, I think. His father is president of Dixie College.

THE WITNESS: Alton Wade is his father.

MR. WILLIAMS: I think that's all I have.

MR. LAUCHNOR: I don't have anything.

(Whereupon, at 2:30 p.m. this deposition was concluded.)

C E R T I F I C A T E

STATE OF)
:
COUNTY OF)

I HEREBY CERTIFY that I have read the foregoing testimony consisting of 42 pages, numbered from 3 to 44, inclusive, and the same is a true and correct transcription of said testimony except as I have corrected it in ink, giving my reasons therefor and affixed my initials thereto.

_____
LORIN DEAN CALDWELL

* * *

Subscribed and sworn to at _____, this _____ day of _____, 1984.

_____
NOTARY PUBLIC

My commission expires:

_____

C E R T I F I C A T E

STATE OF UTAH)
:
COUNTY OF SALT LAKE)

THIS IS TO CERTIFY that the deposition of LORIN DEAN CALDWELL, the witness in the foregoing deposition named, was taken before me, BRAD J. YOUNG, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, residing at Salt Lake City, Utah.

That the said witness was by me, before examination duly sworn to testify the truth, the whole truth and nothing but the truth in said cause.

That the testimony of said witness was reported by me in Stenotype and thereafter caused by me to be transcribed into typewriting, and that a full, true and correct transcription of said testimony so taken and transcribed is set forth in the foregoing pages numbered from 3 to 44 inclusive, and said witness deposed and said as in the foregoing annexed deposition.

I further certify that after the said deposition was transcribed, the original of same was held at the offices of Associated Professional Reporters, 420 Kearns Building, Salt Lake City, for the witness to read, signed before a Notary Public, and to be returned to me for filing with the Clerk of the said Court.

I further certify that I am not of kin or otherwise associated with any of the parties to said cause of action, and that I am not interested in the event thereof.

WITNESS MY HAND and official seal of Salt Lake City, Utah, this 30th day of August, 1984.

My commission expires:

December 8, 1986

Brad J. Young

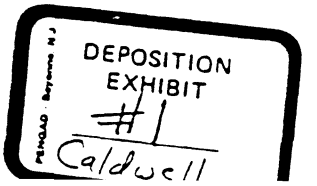
BRAD J. YOUNG

RELEASE OF ALL CLAIMS

FOR AND IN CONSIDERATION of the payment to the undersigned at this time of the sum of TWENTY SEVEN THOUSAND SEVEN HUNDRED FIFTY FIVE AND NO/100 DOLLARS ($27,755.00), the receipt of which is hereby acknowledged, the undersigned, being of lawful age, individually, as parents, natural guardians, and representatives of the estate of Troy Neil Caldwell, and for and on behalf of the heirs of Troy Neil Caldwell, deceased, do hereby release, acquit, and forever discharge KENNETH PAUL BRYAN, FARRELL L. BRYAN, ILENE M. BRYAN, NORMAN L. BROWN dba SPOT II, their agents servants, employees, and insurers, of and from any and all actio causes of action, claims, demands, damages, costs, loss of servi loss of society, comfort, and companionship, expenses, loss of income or other compensation, on account of, or in any way growi out of all known and unknown injuries and/or damages, resulting or to result from that particular automobile accident that occur on or about the 6th day of June, 1982, at or near the intersecti of 3900 South Street and 7th East Street in Salt Lake County, State of Utah, wherein a vehicle operated by Kenneth Paul Bryan collided with a vehicle in which Troy Neil Caldwell was riding, resulting in his death.

IT IS UNDERSTOOD that of the above amount, FIVE THOUSA FIVE HUNDRED TEN AND NO/100 DOLLARS ($5,510.00) represents damag to the undersigned's automobile and that such amount will be mad payable by separate check to State Farm Mutual Insurance Company and Lorin D. Caldwell, wherein a controversy exists between State Farm Mutual Insurance Company and Lorin D. Caldwell as to who is entitled to the said amount, and that the matter will be resolved between the two or by payment into court or by judicial determin tion.

THE UNDERSIGNED HEREBY DECLARE AND REPRESENT that in making this release and agreement it is understood and agreed that the undersigned rely wholly upon their own judgment, belief, and knowledge of the nature and extent of said damages, and that the undersigned have not been influenced to any extent whatsoeve in making this release by any representations or statements regarding the accident, or regarding any other matters, made by the persons, firms, or corporations who are hereby released, or by any person or persons representing them.



IT IS FURTHER UNDERSTOOD AND AGREED that this settlemen is the compromise of a doubtful and disputed claim, and that the payment made pursuant to this release is not to be construed as an admission of liability on the part of the parties released hereby, by whom liability is expressly denied.

THE UNDERSIGNED UNDERSTAND AGREE that the accident resulting in the death of Troy Neil Caldwell, described in this release of all claims, may have caused damages, the existence of which and the consequences of which are now unknown but which may become known in the future. The undersigned nevertheless intend to and do release, for and on their own behalf, on behalf of the estate of Troy Neil Caldwell, and on behalf of all the heirs of the estate of Troy Neil Caldwell, all claims for all injuries and damages to the undersigned, the estate and/or the heirs of the estate of Troy Neil Caldwell, whether now known or unknown and whether now in existence or hereinafter to arise.

IT IS FURTHER UNDERSTOOD AND AGREED that should the undersigned commence legal action against any third party, not released under this release, for the damages resulting from the accident and subsequent death of Troy Neil Caldwell, as described in this release, that such third party will be entitled to a seto for the amounts paid under this release or the percentage of responsibility that might be attributable to the parties released herein, if any, whichever is greater, and this release is intende to comply with the provisions of Section 78-27-42 and Section 78-27-43 of Utah Code Annotated, as amended.

THIS RELEASE contains the entire agreement between the parties hereto, and the terms of this release are contractual and not a mere recital.

THE UNDERSIGNED FURTHER STATE that they have carefully read the foregoing release and know the contents thereof, and the undersigned sign the same as their own free act.

DATED this _____ day of March, 1983.

_____

LORIN DEAN CALDWELL, Individually and as Father, Natural Guardian, and Representative of the Estate and Heirs of Troy Neil Caldwell

M. LARUE HENDERSON CALDWELL, Individually and as Mother, Natural Guardian, and Representative of the Estate and Heirs of Troy Neil Caldwell

Witness:

_____

Tab G

CERTIFIED COPY

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * *

ROBERT KENT HILL, et al.,	:	
	:	
Plaintiffs,	:	Civil No. C83-8099
	:	Judge Judith M. Billings
-vs-	:	
	:	Deposition of:
STATE FARM INSURANCE AUTOMOBILE INSURANCE COMPANY,	:	ROBERT KENT HILL
	:	
Defendant.	:	
	:	
STATE FARM INSURANCE AUTOMOBILE INSURANCE COMPANY,	:	
	:	
Third Party Plaintiff,	:	
	:	
-vs-	:	
	:	
KENNETH PAUL BRYAN,	:	
	:	
Third Party Defendant.	:	

* * *

BE IT REMEMBERED that on the 8th day of August, 1984, the deposition of ROBERT KENT HILL, produced as a witness herein at the instance of the defendant and third party plaintiff, herein, in the above-entitled action now pending in the above-named court, was taken before BRAD J. YOUNG, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, commencing at the hour of 10:50 a.m. of said day at the offices of STRONG & HANNI, Sixth Floor Boston Building, Salt Lake City, Utah.

That said deposition was taken pursuant to notice.

* * *

BRAD J. YOUNG
Associated Professional Reporters
420 Kearns Building
Salt Lake City, Utah 84101
Telephone: 322-3441

APPEARANCES

For the Plaintiffs:	WALLY LAUCHNOR PAULSEN, LAUCHNOR & DAVIS Attorneys at Law 50 South Main Street Salt Lake City, Utah 84144
For the Defendant and Third Party Plaintiff:	R. SCOTT WILLIAMS STRONG & HANNI Attorneys at Law Sixth Floor Boston Building Salt Lake City, Utah 84111
Also Present:	Janet Hill Dean Caldwell LaRue Caldwell

* * *

INDEX

* * *

EXHIBITS

* * *

8A105 0

PROCEEDINGS

ROBERT KENT HILL,

called as a witness by and on behalf of the Defendant and Third-Party Plaintiff, being first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. WILLIAMS:

Q Let the record show this is almost the time and the place for the taking of the deposition of Robert Hill. The deposition is pursuant to notice and governed by the Utah Rules of Civil Procedure.

Would you state your name, please, for the record.

A Robert Kent Hill.

Q What is your age, Mr. Hill?

A 45.

Q Your present address?

A 3213 East Danforth Drive, Salt Lake.

Q Have you ever had your deposition taken before for any reason?

A I don't recall. I don't believe I have.

Q Just so we understand what this procedure is about today, I intend to ask you questions about the nature of this lawsuit that we have going and a little bit about your deceased daughter. If you don't understand any of my questions, I would appreciate it if you would let me know so that we know

we are communicating. Is that fair?

A Yeah, I will.

Q If you don't tell me, I will assume you understand my questions.

Mr. Hill, tell me where you are presently employed.

A Presently I am employed for Rick Warner Ford.

Q In what capacity?

A Automobile salesman.

Q Used cars?

A New; primarily new.

Q How long have you been there?

A About six and a half, seven weeks.

Q Tell me just briefly what your educational background is.

A I graduated from Brigham Young University with a Bachelor's in Spanish and a minor in accounting in August of 1963.

Q Any additional schooling after that?

A Just various classes at the universities and colleges in various towns since then but no degree, no other degree.

Q You have how many children presently?

A We have five children.

Q What is your wife's name?

A Janet.

Q Tamara Elaine Hill was your daughter; is that correct?

A That's correct.

Q Would she have been the sixth child?
A She would have been the second child.
Q I mean you would have six children if she were still alive?
A That's right.
Q Tell me just briefly the names of the others and their approximate ages.
A Okay, Lisa is our oldest. She is 21. Tammy was 16, so she would be 18. Teresa is 15, Teresa Helen. Then there is Tina Irene. She is nine. Then there is Robbie, Robert John. He is seven. And then Richard. He is one year.
Q Are these, all of your children, natural children?
A They are all natural children, every one of them.
Q Both you and your wife, Janet?
A That's right. We have never been married before. This is our family.
Q I understand that Tamara was killed as a result of an accident on June 6, 1982; is that correct?
A That's correct.
Q That accident apparently happened at the intersection of 7th East and 3900 South; is that correct?
A That's correct.
Q Tamara would have been a passenger in a vehicle that Troy Caldwell was driving?
A That's right.

Q As far as you know, she would have been sitting in the front seat, I assume, the information you have?
A That's the information I have. I never did visually verify it but I am sure that's correct.
Q Apparently, Troy -- do you understand that Troy was driving his father's automobile at the time?
A That's right.
Q Did you know Troy Caldwell prior to this day?
A Yes.
Q How did you happen to become acquainted with him?
A Well, he liked our daughter, and they dated a little bit, and he had been over to our home a few times.
Q How long had they dated prior to June 6 of 1982?
A About six months, I guess.
Q Was that a pretty steady dating relationship?
A Well, she was 16, and he was 17. I would say for that age, relatively so.
Q Once a week? Were they together once a week for a date?
A Sometimes. Sometimes more than that, depending. They weren't going "steady" that I am aware of in terms of what the social mores of the kids is.
Q They certainly were not engaged?
A No.
Q They had not talked with you about any plans for marriage?
A Oh, no, not to me.

Q You hadn't heard of those plans from any other source, I guess?
A Well, I think the subject was broached in terms of them thinking an awful lot of each other. But in terms of any seriousness of approaching that idea, no.
Q Tell me just briefly, again from whatever source, your information as to how the accident happened, very briefly.
A Well, very briefly, Troy and Tammy were in the Honda Prelude. Troy was driving south on 700 East, about midnight of that night. They were returning from a show downtown in Salt Lake City. I also have some information of a friend who was in a car right in front of them.
MRS. HILL: Behind.
Q (By Mr. Williams) Who was that person?
A His name is John -- he works for Imperial Realty.
MRS. HILL: Nielsen.
THE WITNESS: So he has verified that as the only real personal contact I have had. They were driving down that road, and they came to a stop light, which was at 3900 South intersection. They were in not the left most lane but -- well, I don't know exactly which lane they were in -- but they came to a stop, and the light changed, and they proceeded -- now, John Nielsen's wife spoke to him --
Q (By Mr. Williams) Spoke to who?
A To John. They were in the car behind them. And said --

you know, she was watching, and said, Don't go. She must have seen the other vehicle coming. But they proceeded into the path of the vehicle driven by Kenneth -- Paul Kenneth Bryan, and he broadsided them with impact and pushed them almost over to the intersection where the Arctic Circle drive-in was. The impact of the pickup being driven by Paul Bryan striking them broadside was where Tammy was seated. He was going at a fairly high rate of speed -- this was all taken in the testimony of the court -- it is a matter of record -- 50 miles an hour, perhaps in excess, and knocked the car clear over there by the corner of where the Arctic Circle drive-in was.

Q Was there anything else that you wanted to say?

A Just that we understand that Tammy was killed instantly and Troy died very shortly, within less than a half hour thereafter.

Q From your understanding, Mr. Bryan would have been traveling westbound?

A No. He was traveling eastbound on 3900 South.

Q That's right, because Caldwell was traveling southbound, you say?

A South on 7th East.

Q You mentioned something about this John Nielsen. Did you personally talk to him?

A After it was all over, I did, because he came to work at

Imperial Realty after this was all over. I had known him previously but I had not spoken to him about it. It was rather interesting that we sat down and had this conversation. He was so close that they could have been involved.

Q They were in the vehicle immediately behind --

A I don't even know if they were in the same lane or not.

Q You mentioned something about the fact that Mrs. Nielsen reported that she could see Paul Bryan's vehicle coming?

A She said something to him. I don't know any other details about that.

Q It is your understanding that she told her husband not to go because of the vehicle coming?

A Yeah. He felt like he could have been in their place. I have reason to believe that they weren't in the same lane. But they did not proceed.

Q You mentioned also that there was a court hearing. I assume that that was on the negligent homicide action that was brought against Mr. Bryan; is that right?

A Prosecution of Paul Bryan.

Q Did you go to that hearing?

A I did not. I read through transcripts of it. I didn't feel emotionally -- I didn't want to meet Paul Bryan face-to-face.

Q Did you --

A For my own personal reasons, which I won't tell here.

Q I understand. I assume you know how the court case came out.
A That's right.
Q The result. Can you tell us what that was, from your understanding?
A Well, rather sketchy. He was convicted on a lesser count than was originally charged. And, gee, I think they were pressing for the most serious charge that could have been brought against someone driving under those conditions. Quite frankly, I don't remember the terms as to just exactly what it was reduced to. But he was convicted and sentenced to the prison, which is unusual in those cases.
Q Is it your understanding that he is still in prison?
A As far as I know.
Q Have you ever at any time talked with Paul Bryan?
A Never.
Q Have you ever talked with an attorney who represented Mr. Bryan?
A Yes.
Q Was that an attorney that represented him on the criminal action or one that was hired by his insurance company, do you know?
A One hired by his insurance company.
Q I will ask you about that in a few minutes.
I understand that Mr. Caldwell was insured by State Farm

at the time of this accident. Were you insured at the time on any vehicles you owned?

A I probably was but I didn't make any --

Q Do you know the name of the company that you were insured with?

A No. I didn't come prepared to answer that.

Q I understand.

I understand also, Mr. Hill, that after your daughter's death that there was a certain amount of money paid to you under what they call the no fault benefits of Mr. Caldwell's policy; is that correct?

A That's correct.

Q Am I correct in stating that that was approximately $6,000?

A $5,000 was paid to me on about the 17th of June, and I understand that another $1,000 was paid to the mortuary direct. Well, I am sure that was paid -- I verified that -- by State Farm.

Q At some point in time did you obtain the services of an attorney after your daughter's death?

A Yes, we did.

Q Who did you contact first?

A Well, I contacted the bar to get some references, some referrals. They gave me Dale Kent and one other one, one other attorney. I went to see Dale Kent, but I don't recall

the name of the other one. I am not sure I called. I made several inquiries to try to get some sort of referral through either the bar or this referral service they have for attorneys. And we did have a meeting with Dale Kent.

Q What were you hoping to accomplish by going to see Mr. Kent? What was the reason for that?

A Well, okay, now, this all boils down to a highly emotional situation. I would have to interject that right shortly after the accident, CUMIS, CUNA Mutual Insurance, called us in, the Caldwells and Janet and I, to make us an offer of the amount of the insurance coverage, as soon as they had gone through their rigmarole of death certificates and so forth. And I don't remember whether we contacted an attorney before or after that. I think it was after that.

Q Let's go back to that, just take things chronologically. Your first contact with anybody from CUMIS was in response to a phone call from them?

A I don't remember how that was initiated. I think our first contact with an insurance company was with State Farm. I talked to Mr. Davis, and I went in and saw Mr. Davis. And I think as a result of that we were able to supply him with death certificates or whatever he required for the no fault benefits that were subsequently paid. And then somehow -- of course, the Caldwells and Janet and I worked together on this -- either through State Farm or through our own resources

we somehow got in touch with CUMIS. Perhaps they called us.
Q Can you give me a time frame that that might have taken place, from the date of the accident?
A I wasn't able to find my correspondence file with CUMIS.
Q Just approximately how many months after?
A Well, like I say, CUMIS made us an offer, us and the Caldwells, within a relatively -- you know, within three weeks of the time, maybe a month or less. I don't remember exactly. We went to their office, and they wanted us to sign the release.
Q You and your wife went?
A Uh-huh (affirmative).
Q And Mr. and Mrs. Caldwell went in?
A That's right.
Q Who did you meet with at CUMIS, do you remember?
A Greg Winget.
Q Is that W-e-n-g-e-t?
A I think it is W-i-n-g-e-t. I don't know exactly how it is spelled. I remember in our conversations, I also talked with Mary Cornevaux.
Q Prior to the actual meeting in the office of CUMIS, can you tell me anything about the substance of conversations you had with anybody from CUMIS over the phone?
A Yeah. It had to do with a question as to whether or not they were liable in the accident, as to whether -- that's

where it started. Now that I recall, my mind is starting to come back. They didn't claim any responsibility for it at the outset, in our initial conversations.

Q Tell me about that.

A Well --

Q Who did you talk to and what was said?

A Either Mary Cornevaux or Greg Winget. There may have been one other individual. You know, we were pursuing the insurance claim. One of the reasons is because I wasn't particularly well -- I wasn't financially strong at the time. I didn't have any savings. And there was some people that gave us some money, because I was totally incapable of working right at first. The emotional impact of it was a surprise to me. I didn't realize that I would be incapacitated the way I was.

Q I understand.

A So we pursued the insurance thing, and they had to call their home office and see if actually there was liability, because there was a question as to whether or not they were liable for the insurance on the vehicle because Paul Bryan was not a licensed driver at the time and his parents were the ones who provided him with the vehicle -- my understanding -- and they were the ones who carried the insurance on the vehicle he was driving, on the pickup.

Q Let me see if I can summarize that to your satisfaction.

Apparently, you initiated the contacts with CUMIS, based on your memory now?

A I can't say for a fact whether or not I initiated or whether they did. I honestly do not recall.

Q In any event, you are asking the question about trying to get some insurance proceeds?

A Yeah. We got together, that's right.

Q You wanted to get paid some money from their insurance policy; is that right?

A (The witness nods head in the affirmative.)

Q And you let them know that; is that right?

A (The witness nods head in the affirmative.)

MR. LAUCHNOR: Answer audibly.

THE WITNESS: Yes.

Q (By Mr. Williams) They said, in short, there may be a question about whether there is coverage that would require the insurance company to pay?

A That's right. That was definitely a question at first.

Q Your understanding of that coverage question relates to the fact that he wasn't a licensed driver?

A Well, the fact that the vehicle was not registered in his name, apparently. That, I can't state for a fact. But I do know that he had had his license revoked on several occasions, so he was incapable of purchasing insurance on his own. And the vehicle was insured by his parents. He was driving the

vehicle -- and there is no question about that -- at the time of this accident. So CUMIS did raise a question that they were liable. And they had to determine that. And part of that was corresponding with their home office and getting a certified copy of the policy. It had to be registered in the county wherever the policy was issued, back in the Mid-West and so forth.

Q What is the next thing that happened?

A That was at the time they made us the offer.

Q They brought you in after they had done their initial checking?

A Yes. They determined that they were liable, to their own satisfaction.

Q Then they invited you in?

A Brought us in and made us an offer, at which time they wanted us to sign a release of all claims.

Q Tell me, as best you remember, everything that was said in that meeting.

A Mr. Winget came in. We were all seated there. He had the form. He was polite and gracious and made reference to the fact that they had to deal with this, and made a statement, and of course, it was in writing on the release of all claims. They made a full offer of the full limits of the liability -- the coverage under that policy, which was a total combined limit of $50,000, divided equally between the

Caldwells and ourselves. So that would have been $25,000 for each. That offer was made in writing and verbally. And that was in the form of a release of all claims, that they wanted us to sign at that time, at that meeting.

Q What else was said or what else happened in that meeting?

A Well, we declined to sign it.

Q Declined to sign the release?

A Uh-huh (affirmative). We declined their offer.

Q For what reason?

A Well, I think by that time we had contacted another attorney. Yeah. I think we had contacted Keith Nelson, and suggested that that may not be a wise thing to do.

Q Let's back up a little bit. Prior to going into the meeting at CUMIS, you apparently met with Dale Kent?

A Yes. That was one of the first things we did.

Q I assume, though I don't want to put words in your mouth, that you were going to Mr. Kent for legal advice about --

A That's right.

Q -- what to do with --

A The broader background of it would be this. I have never been involved in a lawsuit before. I have never been through a traumatic situation like this in my life. And I was a little befuddled and I was a little unsure what was the best thing to do. There was a very deep moral issue involved as to whether or not I should just forgive the man, take the

insurance money offered and let it go. So there was this old human motive of whether or not I should pursue that family.

I learned very early on that his parents were aged. One of them was infirmed. They didn't have great assets. And that if we sued, we would be suing them, not this guy. His life was in a mess. He didn't have control of his life or he wouldn't have done this. So we -- in my own mind, it was a very conscience-oriented thing as to whether or not I should even consider suing them. I knew I wouldn't be suing this yokel. I would be suing his parents. He had no assets. So it was a conscience issue with me. I did not want to sue.

But I was correlating the wishes of my wife and the Caldwells. We were all heated. And it was not a unilateral action or choice on my part. I did not make all the decisions. I was trying to reconcile the points of view of three other parents. And that is the reason that I consulted an attorney in the first place.

Q That must have been within the first three weeks you saw Mr. Kent?

A Yes.

Q Prior to the time you went in to see Mr. Kent, had you done some of your own investigation about the financial abilities of the Bryans?

A Well, I think there had been some conversations between the Caldwells and the Bryans, as I recall, early on. I did

not personally go to see them until much later in the proceedings. But I did -- you know, the word got out very quickly that they were very sorry about it, the parents. He was an adopted child. They were very sorry. I did not feel emotionally prepared to confront them or him.

And so I just went on the information that we got through phone calls and -- you know, there were other people that were intensely interested in this. There were law enforcement officers. This Officer Odor was deeply involved in it. He took it very seriously. He did a lot of investigation. He was helpful, nice. I received information from many sources.

It was very early on, right after the accident, that I ascertained the parents provided the insurance. They were older, infirmed and penitent. They felt very bad about it.

Q Did they appear to have assets, and, if so, can you tell me what they had?

A It was just hearsay at first, that they didn't have anything much, and so then after we saw Dale Kent, we decided not to go with him, we talked with Keith Nelson, he suggested there may be other insurance coverages. He suggested there may be some insurance in the bar where this guy was served. According to the Utah Dram Shop Act, he should not have been served when he was under the influence of alcohol. It abetted the situation so he committed what he did. None of these decisions were based on one or two items. They were based on

the feelings, emotions of the other people involved.
Q Let me see if we can just focus in on one event at a time.
A But all these things happened at once. All these bits of information were at my disposal very early on so I could make a determination, shall I forget these people and just let it go and take the offer, or shall we pursue it from a legal standpoint? Because my motive I have was not just money. We had been hurt. We felt perhaps maybe some sort of warped justice could be done. Because there were heated feelings on all of our parts. To be very frank, my first reaction was, it is done. The poor guy, you know. He has really loused it up. I can't better my situation. So I really didn't want to sue at first.
Q You went to Dale Kent. You decided not to use Mr. Kent?
A That's right.
Q Can you tell me why?
A Just thought that perhaps Keith Nelson would be better. I knew Keith. We grew up together. He was a better attorney. And he had some knowledge and expertise in this field.
Q It wasn't because of anything Mr. Kent said?
A No. He was nice and fine. It was just I didn't feel like -- it is all relative. If one man is more qualified than another, I will go with the man I feel I can trust, first of all, because I knew Keith. I knew his family. I knew his background. To me, he was trustworthy and I could rely on

his expertise as well as the fact that he would be square.
Q Did you meet with Keith Nelson prior -- just so I am clear on this -- prior to the meeting at CUMIS? I think you implied that but I am not sure.
A I think I did on an informal -- I am not sure. I do not remember exactly. I met with Keith once before we met at his office.
MR. WILLIAMS: Let's see if your wife can help us, if it is all right with you, Wally.
MR. LAUCHNOR: Fine.
MRS. HILL: I think it was exactly two weeks, I remember, meeting with Keith in their home.
THE WITNESS: Was that before we met with CUMIS and they made us the offer?
MRS. HILL: I think so.
THE WITNESS: I am still not sure about that.
Q (By Mr. Williams) In any event, when you went to see CUMIS, you had reservations from someplace about whether it was the best thing to do to sign the release at that time?
A Yeah. As a matter of fact, even on the simple basis of whether or not I was properly oriented and emotionally clear at the time to be able to do that.
Q You didn't take their money at that time, and you told them that. What is the next thing that happened in the chain of events, as far as you can remember?

A And then we proceeded with Keith Nelson and Mr. Davies, his assistant, who started an investigation into the -- all of the avenues of possibility.
Q That was Lynn Davies?
A Uh-huh (affirmative). Simultaneously, they were investigating The Spot II, which was the bar where Paul Bryan had had his last drink. At the same time they were checking into the possibility of any other insurance coverage or whatever that the Bryans may have had. To make a long story short, they found out there wasn't much, and after it drug on and on and on, I finally went out to see the parents of Kenneth Bryan myself. I made an appointment with them and went out and saw them and talked with them face-to-face. I could see their situation.
Q Let me stop you there for a second. After you saw Mr. Nelson again, and he started the investigation, was there any contact during that period of time, any further contact during that period of time, with anybody from CUMIS, before you go to see the Bryans?
A Well, I am sure there was. Okay, I have a letter here that shows when Keith Nelson sent a letter to CUMIS, telling them to withhold payment of all claims until they had been -- any claims had been satisfied. So that's -- so I don't remember exactly what happened after then, it was kind of a waiting period for the Nelson -- Keith Nelson and his

assistant to do their thing.
Q That was approximately how long a period of time before you went to see them?
A The letter was dated in August, where he sent it to CUMIS, telling them to not pay any claims until all claims were satisfied through his office. Then the investigation continued.
Q Can I see that letter, so we just don't have to ask any more questions about it?
A Yes.
Q We are looking at a letter dated August 4, 1982, to Mary Cornevaux of CUMIS Insurance, signed by Keith Nelson and Lynn Davies.

Mr. Hill, how long after this letter do you think it may have been before you went to see Mr. and Mrs. Bryan?
A Oh, it was probably at least six weeks, maybe two months. It may have been more than that. Because the whole thing drug on until February of the next year.
Q You think you saw them in the fall of 1982 sometime? I understand it is hard to come up with dates.
A I think it was towards the fall. I really do. It may have been even a little later than that. Because, you know, the other investigation was taking place, and we took -- you know, they took depositions from this guy that had The Spot II, and that was fruitless.

Q Did Mr. Nelson file a lawsuit at some time in your behalf?
A That's right, there was a lawsuit filed against the Bryans and against this guy that owned The Spot II -- that had The Spot II.
Q That lawsuit would have been filed approximately August of 1982; is that right?
A Shortly after this letter, I am quite sure. They just went right into it.
Q Mr. Nelson was representing you and your wife in that case?
A Uh-huh (affirmative). And Mr. Davies.
Q As I understand it, The Spot II, Norman L. Brown, he represented himself in that action? Does that sound right to you?
A For a while, until it came to the point of the depositions, and then he had an attorney.
Q Who was his attorney at that point? Do you remember? If you don't, that's fine.
A I could probably think of the name. He was a local attorney.
Q I assume you would agree that Tony Eyre represented Kenneth Bryan in that case? Does that sound familiar?
A There was two or three attorneys involved there. There was Tony Eyre. And I talked to him. And I also talked to --
Q And Leonard Russon?

A Yes.
Q Leonard Russon was representing the parents, though. Does that sound right?
A Uh-huh (affirmative), that firm.
Q Both Mr. Russon and Mr. Eyre, as far as you understand, would have been hired by Bryan's insurance company?
A I guess. I don't really know for a fact whether they were hired by them personally or the insurance company.
Q You went to see Mr. and Mrs. Bryan. First of all, did you go with your wife?
A I went alone. I made an appointment with them on the telephone. We had talked briefly on the telephone.
Q What was said in the telephone conversation, briefly?
A Oh, I don't know, just things like -- you know, they were so sorry. It was usually the woman that I talked to. She was a little more talkative. And I just told them, you know, I don't hold anything against you personally, but I would like to come out and talk to you. I want to get this resolved.
Q So you met with them. Tell me what was said, briefly, in that conversation.
A Well, I just went to their home in Tooele. I had made the appointment. They were there and a daughter of theirs was there, in their living room. They talked a lot about Kenneth, how they adopted him, their lives. He even talked about his earlier life, and how he had had all these

problems, and they were so sorry.

So I finally asked them a few pointed questions about assets. And he said he didn't have any except his home, which was free and clear. But I wasn't about to proceed against them to take their home away, because they were aged. They were beyond 70. They seemed like nice people, decent people.

So I must have been there half an hour. We talked around those subjects. I talked about my daughter, our family. He talked about his son and their family. He talked quite a bit about his early life and his relationship with his family, as I recall.

Q Was their story about the assets they had consistent with what you had learned before?

A Yes.

Q Apparently, Mr. Nelson and the attorneys from that firm had done their own investigation into the assets?

A That's right.

Q And they told you essentially the same thing; is that correct?

A Uh-huh (affirmative). Of course, my purpose for going out there was not primarily to check into assets. That was part of it. I just wanted to meet them face-to-face because to me the moral issue was more important than the legal. I mean, you know, in the Bible it says that you are supposed to forgive. So I wanted to meet them so that I would have

something in my mind to grab onto to help me to come to grips with my own feelings in the matter. I am not a mercenary person. I was not angry or vehement towards them. I was polite the whole time. I did ask them a couple of pointed questions about their assets. If they had been wealthy people and it wouldn't have hurt them, maybe it would have been right to pursue it. It would have hurt them in a time in their life where it maybe could have caused physical harm to them had we proceeded further with this. And they were anxious to get it settled and over with. Because it was an anxious time for them. They suffered in a way just as much as we did, I am sure.

Q Is it fair to say that from the point that the lawsuit had been filed that your contacts with CUMIS were through the attorneys representing CUMIS?

A Pretty much for a period of time there, while we were waiting to see if we could, you know, do anything.

Q Can you tell me the course of events, what is the next thing that happened that you feel is significant?

A Just before I went to see the Bryans, I felt -- I don't remember whether that was actually -- the turning point was the deposition of this Brown. And Keith Nelson said, Well, you know, I don't think there is anything to be gained by going against either one of them. They were both -- either the owner of the -- not the owner but the man who had

The Spot II. He didn't own the real estate, this Norman Brown. He didn't have any assets. And they weren't able to ascertain that there was anything to be accomplished by pursuing the Dram Shop Act. So he advised me to drop it. So that's when I went to see the Bryans. And then, you know, we told them, Okay, we are going to get it wrapped up.

Q As I understand it, Mr. Nelson is not representing the Caldwells during that time period; is that right?

A That's right. He was representing us alone.

Q Mr. Caldwell, though we can ask him, apparently was getting counsel from someone else?

A That's right.

Q Is there a reason why, in your discussions with Mr. Caldwell, you decided not to use the same attorney?

A I don't even remember, except that we didn't agree 100 percent on the approach of this. Like I said, I didn't want to sue at first, but -- anyway, we ended up doing it. We just got different attorneys. I guess I just felt good about seeing Keith. I really didn't know what to do. I just --

Q I understand.

A You understand, the moral issue is this.

Q You told me.

A If you sue a rich man and you don't break him, it is an altogether different thing than getting blood out of a poor man, which would serve no purpose. That was my whole feelings

at the time. If there were something they were hiding, I thought we should find out. Because it was still concert of all of us rather than just my decision.

Q Tell me what the next event is that you think is significant.

A Well, then, after we decided to drop the suit, then the delays started, and then we couldn't get settlement.

Q When you say the delays started, you mean --

A Well --

Q What do you mean?

A We got Nelson to withdraw officially from the case, which had to be done.

Q Tell me about that. Why is that?

A Well, because he went on record as representing our interest, and nothing was to be paid, as that letter indicated, out, without their approval. It is a legal action that would enable him to speak in our behalf and to receive moneys in our behalf, whatever came out of the suit.

Q Did you have some kind of a fee arrangement with Mr. Nelson -- I assume you did -- where he was to be paid somehow for legal services rendered?

A That's right.

Q What was the arrangement?

A It started out as a verbal agreement. And I don't remember exactly what it was.

Q Did he take the case on what we call a contingency fee?
A Yes, that was the agreement.
Q Was there a discussion about whether he would be entitled or whether he would take money from out of the $25,000 that you had already been offered?
A There was.
Q What was that discussion?
A I think it was something in the nature of one third. I don't recall. We had a verbal agreement, and then when it came in writing, it was different.
Q Do you have a copy of an attorney fee contract that he provided you?
A I probably do if I can locate -- when I locate my file. I wasn't able to locate that file but I really didn't start to look for it soon enough.
Q Just so I understand what you were saying a minute ago, are you saying that when it came time to drop the case against Mr. and Mrs. Bryan and against The Spot II that Mr. Nelson backed out of representing you?
A Yeah. That was the only thing to do. I asked him to withdraw because we weren't going to pursue it any more, based on his investigation, our accumulation of facts and information and our own feelings, decided to drop it. And that would necessitate his withdrawing legally so that we could proceed to claim the money that they had offered us

initially.

Q Is there some reason why he didn't at that point continue the negotiations with CUMIS, or is it just that you felt he wasn't needed at that point?

MR. LAUCHNOR: Maybe I can help here Scott, save some time. Correct me if I am wrong. It was my understanding that you hired Keith after they had offered you the policy limits to see if there was any other assets and to find out all of the facts, that Keith came back and said they had thoroughly investigated all of these other possible defendants and the boy and found there was nothing available in assets to pursue further, other than the insurance with CUMIS, and his contingent fee, as I understand it, was based upon anything he was going to find over what you had already been offered.

THE WITNESS: That's right exactly.

MR. LAUCHNOR: They couldn't find anything, Keith withdrew.

THE WITNESS: That's right. I am sorry, I didn't remember that. That's what it was.

Q (By Mr. Williams) That makes sense, then. I appreciate that, Wally.

So at that point you were prepared, ready to go to CUMIS yourself? Is that what you are saying?

A Yes. We figured, well, let's get it over with.

Q Had the Caldwells reached the same point in their

investigations, where they were ready to go with you to CUMIS?
A Their attorney was a little slower, and they couldn't get positive response so they could act at the same time we could.
Q We will go into that with them. Tell me, did you then have a meeting with CUMIS or did you talk with them on the phone? What happened next?
A We resumed our correspondence. A lot of it was on the telephone. I went in to see Greg a few times and then some other things started to happen in regards to the change in the initial offer was -- the initial offer was no longer extant.
Q At the time that -- let me see if I can clarify some things in my own mind. At the time you were given the initial offer by CUMIS, had you already been paid by State Farm for the $5,000?
A We had been paid the no fault benefits for the --
Q Death benefits?
A For the death, right.
Q Carrying us through now to the time that you are going back to CUMIS, ready to negotiate a settlement yourself with them, are you telling me that their offer somehow changed?
A That's right, in addition to -- they had made the initial offer of $25,000 each, and after all of this had been done, in the meantime State Farm came in and said, Through our right of subrogation, we want $5,500 of that money. They had originally wanted all the death benefits too, apparently.

That, I wasn't personally involved in. That was Dean. He was insured by State Farm. The car they were killed in was paid for. And they wanted that taken out of the proceeds of the $25,000. Initially, they wanted the death benefits that we both received taken out of the total $50,000 that CUMIS had.

Q How did you find out about that?

A Through ---the Caldwells and I worked closely together. We each knew what the other was doing.

Q Did you ever personally talk with anybody from State Farm prior to that meeting with CUMIS, where they tell you that the settlement has been changed?

A I honestly do not recall. I remember meeting with Mr. Davis. I may have talked to him one other time. I was keeping some notes on the chronological progression of this, but I don't know if it is in those notes or not. I could only find a page or two of them.

Q Did you bring your notes with you today?

A Just one page of them.

Q If you need to refer to your notes to help you with these questions, I would appreciate it if you would do so.

MR. LAUCHNOR: Do you understand what he is asking you? He wants to know if before you went back to Greg Winget to tell them you decided to go ahead and take the $25,000, had State Farm, the adjuster or whoever at State Farm you were dealing with, told you that they wanted out of that $25,000 to

be repaid the damage on the car and your no fault benefits that you had been paid?

THE WITNESS: I think I got that indirectly through the Caldwells, quite frankly. Because Dean really went to bat with him because he had paid premiums to them for 20 years or more. If I did make contact with them, I may have made telephone contact, but I don't honestly recall at this point.

Q (By Mr. Williams) You went into CUMIS. What did they tell you?

A Then they told me that the amount was reduced to the $5,500 less than the $50,000 that was going to be split.

Q Is that the total $50,000 was reduced or was your $25,000 reduced?

A Well, our $25,000 was reduced by $2,250.

Q That was the offer they made to you?

A Yeah. That was drawn up on the second release. I think we -- I don't remember if we went out there or what.

Q Was that Greg Winget that was carrying on this discussion?

A Primarily, yeah.

Q What happened then?

A Well, that's when we started to demonstrate against that and said, That isn't fair. We don't feel that's right. It was a concerted effort. We weren't alone in it. The Caldwells were with it.

Q At this point you were not personally represented by a

lawyer?
A In between, we weren't, no.
Q At the time you went out to meet with them, you were not represented?
A When they made the first offer, we were -- I don't think we were represented.
Q I am talking now about the time they said the offer was reduced.
A I can't remember if we went out there again. I think we did. Yes, I know we did. The Caldwell's and Janet and I went out there again, trying to get it settled. It was in the same room, the same type of form, except the figures were changed from $25,000 each. They were changed to $22,250 each.
Q There is the first time back before you ever filed a lawsuit?
A That's right.
Q And this is the second time you are now talking about, where they said you have got to take $22,500 or whatever it was?
A That's right. $22,250.
Q That was Greg Winget?
A Uh-huh (affirmative).
Q Did he tell you why you had to take that reduced amount?
A Well, the reason was that State Farm had paid $5,500 out for the car, the Prelude, that they were killed in, and they

wanted it through their rights of subrogation. It was a total combined limit. Technically, it was a problem as far as from their point of view.

Q Did he say anything else about it that you can now remember?

A Well, there was a lot of correspondence, primarily on the telephone, between myself and Greg Winget.

Q There was some written correspondence?

A I think there was some. Very little. There was a lot of verbal.

Q Whatever is written, you have now misplaced someplace and hope to be able to find it?

A Yeah, I can find it. I just wasn't able to find it. I didn't start looking early enough. But the essence of it was that once we were ready to drop the suit, had dropped the suit, they would not pay us the money without deducting that amount. If we were willing to sign then, they would pay it.

Q That was their firm offer, and they were not going to deviate from that? Is that what you understand?

A That's right.

Q Their position is, we have got to pay this to State Farm?

A That's right.

Q Can you tell me now what is the next thing that happened -- here, what I am looking for, I want to try to get this in chronological order -- did you then go to see an

attorney again or did you then go to see State Farm? Tell me what happened next.

A I don't recall that I personally went to State Farm, because it would just have been redundant. Dean was -- Dean Caldwell was doing that. I was aware of what he was doing.

Q He was talking to them?

A Uh-huh (affirmative).

Q What do you understand the substance of those conversations to be?

A Well, that he didn't feel it was fair, either. As far as I understand, if he hadn't have gone to them and raised Cain, they would have deducted the amount of the death benefits from this. So he went down there, and spoke very strongly in our behalf, with State Farm, and they said they would waive that, quote unquote. I don't know about the correctness of that. But that's the term they put it in.

MR. LAUCHNOR: You mean the death benefits?

THE WITNESS: Yes. They were going to initially take that out of the proceeds.

Q (By Mr. Williams) I will ask Mr. Caldwell more about that.

A I am just trying to give you what I did personally. This is all second.

Q Were the two of you more or less working together at that point in time, you and Mr. Caldwell?

A Yeah. We always cooperated on it.
Q Did you consult with an attorney during that period of time?
A The intervening period of time, I don't remember how much -- we were just trying to get it settled. During that period of time, I went to the State Department of Insurance, talked to two or three people. One of them was almost helpful. He was an attorney.
Q Who was that? If you don't remember, that's fine.
A I could find out his name. He was a nice gentleman.
Q When you say he was almost helpful, what --
A Nobody else was. I talked to two or three people there at the State Department of Insurance, and most of them were old insurance company employees, and they said, That's their right. They would just forget it. This man understood that there were more -- greater ramifications than just what was on the surface that everyone was quoting.

So I went to the law library at the university and started reading up on this type of thing and I found out there were in fact precedents that indicated they do not have the right, unquestioned right, to use the right of subrogation against all things. As a matter of fact, in certain cases, they had been required to pay over and above the stated limits on the policy. And the whole concept of the law is to make the injured party whole, which no one seemed to give a damn

about.

Q How did you first become aware of that concept that the injured party has to be made whole?

A Well, I think it came up early in the business, because we had been injured in an irreparable way.

Q I understand. But who first told you about it?

A I think I read it in my research. I spent several hours at the University of Utah law library, referencing. I got it down. I have some copies of precedents and so forth. At that time I decided, okay, they weren't able to help me a heck of a lot at the State Department of Insurance. I gained a lot of information up there.

At that point in time that's when Dean and I got together and decided to get another attorney. They wouldn't give us our money without holding that out. I had just enough basic information to decide maybe there was some reason to pursue this. That's when I contacted Mr. Lauchnor. I contacted Brett Paulsen to get a referral, and he said that Mr. Lauchnor had some expertise in that area.

Q He was very well qualified? I just threw that in for Wally.

I think I asked this before, but I think we got sidetracked. Can you tell me what Mr. Caldwell told you was State Farm's position about the $5,500?

A That they just flat refused to let it go, that they

wanted that out of the proceeds.

Q So you went to see Mr. Lauchnor. That was approximately what period of time?

A Approximately January of 1983.

Q Did Mr. Lauchnor at that point handle discussions with CUMIS or State Farm, or did you get involved in those?

A Well, we just talked to him, and he agreed to take it, and so -- I know what it was -- well, very simply, we -- he was able to get a release signed so that they could hold the $5,500 in escrow or just release the balance of the money that was not in question, which we were unable to do ourselves. It was either all or nothing. It was either take it with the $5,500 out or you get nothing. That went on for some time. And that was a real problem time.

Q Just in short, now, Mr. Lauchnor worked with CUMIS's insurance companies to prepare a release that would give you the money but allow you to contest the issue with State Farm? Is that what you are saying?

A Uh-huh (affirmative). Otherwise, we wouldn't have received a cent. They had refused to pay out any moneys until we signed the release, based on that amount, and releasing everyone from everything.

Q Do you have a copy of the release in your file?

A I probably do but I don't have it with me.

MR. WILLIAMS: Let's mark that.

(Defendant's Exhibit 1 was marked for identification.)

Q (By Mr. Williams) Let me show you what has been marked as Exhibit 1 to your deposition, and ask you if you have seen that document before or a copy of the document?

A Okay, this is the release, after we obtained the services of Mr. Lauchnor.

Q Who did you understand actually prepared this release? Was it the law firm of Leonard Russon, as far as you know?

MR. LAUCHNOR: I don't think he would have any way of knowing.

THE WITNESS: I don't recall.

Q (By Mr. Williams) Did you sign this document which is -- a copy of which I don't have your signature. Did you sign this?

A Yes, we did sign that.

Q It is dated blank day of March, 1983. Do you remember --

A That's about right.

Q You signed it in March, you think?

A Uh-huh (affirmative).

MR. WILLIAMS: Do you have a signed copy of that, Wally?

MR. LAUCHNOR: I am just looking. I think I do. Is that a copy I provided to you in answers to interrogatories?

MR. WILLIAMS: Yes. I assumed you didn't have a signed copy or you would have given it to me.

THE WITNESS: Before we got to this point, there were several heated conversations, you might say, and I even had another meeting with Greg Winget, trying to get this resolved. And it got to the point where I couldn't deal with him any more because I couldn't get any satisfaction.

MR. LAUCHNOR: I don't see, offhand, a signed copy. I may have.

Q (By Mr. Williams) You indicated that you had met with Mr. Winget.

A And talked to him.

Q Was this alone or was your lawyer with you?

A I was alone. This was before I had gotten Mr. Lauchnor. After I got Mr. Lauchnor, then I just walked out of it. Because the emotional part of it was getting to be too great.

Q But the essence of Mr. Winget's claim, or his position, I should say, is as you have told us before? They were just not going to pay it without paying State Farm; is that right?

A Uh-huh (affirmative).

Q So you got Mr. Lauchnor, and he negotiated for you this release of all claims which you signed?

A (The witness nods head in the affirmative.)

Q Is that right?

A Uh-huh (affirmative).

Q Did your wife sign it as well?

A Yes.

Q Were you present at the time that a similar release was provided to the Caldwells for them to sign?
A I think we were.
Q Did you sign the documents together?
A Yeah. We did most things together, as much as possible.
Q Did you read the release before you signed it?
A Yes.
Q Did you feel like you understood it?
A Yes. But it has been March -- I don't know that I may have read it once between now and then.
Q What I am saying, at the time that you signed it, did you feel that you understood it?
A Yes. It was in English that was clearly stated.
Q Your lawyer, did he take time to explain it to you?
A Sure, he did.
Q Is there anything that does not appear on this release that you feel was part of your understanding or agreement with CUMIS? Or is it all contained in this release, as far as you know?
A As far as I understood, it had to be.
Q In fact, there is a part in here, isn't there, that says this is the entire agreement? Do you remember that part?
A No, I don't. All I know is that the intent of this release was to leave it open for us to pursue this other because we didn't feel like we had been dealt fairly with.

That's the premise of the whole reason we are here.

Q Do you recall taking the time or even being curious enough to read Mr. Caldwell's release to see how they compared?

A No, I did not, because I assumed that they were the same.

Q According to this release, and as you understand it, you were to get the $22,245? Well, the release is clear. I don't need to go into it.

Before you signed the releases, you were clearly aware of State Farm's position -- as I understand it, their position was they were entitled to get their subrogation; is that correct?

A Yes, that was the whole basis of the difficulty.

Q Were you aware of the fact that, assuming State Farm didn't get the money which they said should come to them from the insurance policy, that they could also pursue a subrogation claim against the Bryans? Were you aware of that?

A No.

Q For that money?

Just speaking hypothetically, if State Farm had not taken that position that they were entitled to that money from the insurance policy, are you telling me that you were not aware of their right to go against the Bryans?

A I was not. Up to this point, I was not.

Q Were you aware that by signing the release that you in fact would prevent State Farm from doing that?

MR. LAUCHNOR: I object, instruct him not to answer that. It calls for a legal conclusion.

Q (By Mr. Williams) Let me ask it this way, then. Were you aware, from any source of information, what State Farm's rights would be after you signed the release? Did you have any knowledge about that?

A Well, I would probably have to reread the thing, because I would have been thinking about that at the time I read the release, if it did come up. Not being an attorney, I don't know those things. But I just took it at face value and did what we had to do because it had been a long period of time and we had not received any settlement.

Q It was your intent by signing this release to fully release Kenneth Paul Bryan and his parents from any liability under this accident; is that correct?

MR. LAUCHNOR: We will stipulate for the record that that was the purpose of the release.

Q (By Mr. Williams) Did you have any additional contacts with State Farm, yourself, after the release was signed?

A I don't believe that I did. I was getting pretty washed out by then.

Q I just briefly want to find out a little bit about your daughter Tamara. I know we have gone a long time, longer than I had expected. Let me just ask you a few questions about her. She was in what grade at school at the time of the

accident?
A Sophomore.
Q Just completed her sophomore year or just going into it?
A Just completing it.
Q She was at what high school?
A Brighton.
Q What kind of grades did she get in school?
A She got B plus. I would have to check Janet with that. Isn't that correct?
MRS. HILL: B average.
Q (By Mr. Williams) Were you, as a father, satisfied with her grades in terms of her potential?
A Well, not entirely, because I knew she was capable of a little better grades. But I also knew that she was highly socially oriented. She was an approval-oriented child. So it was more important to her to be active in all kinds of affairs and not spend quite so much time studying. That was her nature.
Q What were her best courses, as far as you know?
A Well --
MR. WILLIAMS: Mother, if you can help on some of these, I would invite it.
THE WITNESS: She did pretty well in English. She did well in modeling. She did well in PE. Didn't she have something else?

MRS. HILL: She liked literature

Q (By Mr. Williams) Did she have some preferences for a career that she discussed with you or your wife?

A She was a cheerleader and she wanted to be in modeling.

MRS. HILL: She also wanted to be a hairdresser.

THE WITNESS: She was interested a little bit in cosmetology.

MRS. HILL: She was going to do both, modeling and hairdressing.

MR. WILLIAMS: Had she taken any courses toward a cosmetology degree?

MRS. HILL: She had -- what would be the word -- under Loujene. She could have gotten a scholarship because she worked under a friend of mine that had a beauty shop in her basement.

THE WITNESS: She took that modeling course at school. She did well in that. She worked for Denver Manufacturing, modeling this western wear.

MRS. HILL: So early in her life to have gotten everything completed. She was starting but really hadn't had a chance to finish anything.

Q (By Mr. Williams) Did she have some part-time jobs?

A She had just taken a job at Wolfe's, Jack Wolfe Ranchwear, worked a couple of days.

MRS. HILL: That was in Fashion Place Mall.

Q (By Mr. Williams) Was that a job that she was to work full time through the summer?

MRS. HILL: Uh-huh (affirmative).

MR. WILLIAMS: That's a yes over there?

MRS. HILL: Yes.

MR. WILLIAMS: This is probably better than taking two depositions. But it is a little hard on Brad.

Q (By Mr. Williams) Had she worked part time anywhere else prior to that?

A Only as a babysitter and that sort of thing that the kids do.

Q I assume at Jack Wolfe's she was just going to be a salesclerk?

A That's right.

MRS. HILL: She sold more in those two days, though, than some of their people had in two months. She was a goer.

Q (By Mr. Williams) Did she have some particular skills that you want to tell me about that I haven't asked about already, skills or --

A Well, Tammy's greatest assets were her ability to deal with humanity. She had the gift of friends, I call it.

Q Did she have some particular talents that she had developed? I understand this may be emotional for you to go into. If you would like to take a break, we can.

A She was --

MR. LAUCHNOR: Do you want to take a five minute break?

THE WITNESS: No, let's get it done. She was a very intelligent child. She was very outgoing. She was very loving and very understanding. I had a better relationship with her than I have ever had with any of my other children. Excuse me.

MR. WILLIAMS: Let me ask your wife a couple of questions. You are affected, too.

Can one of you tell me, did she play any musical instruments?

MRS. HILL: She played piano.

MR. WILLIAMS: Had she reached the point of excellence in that, or was she just sort of hit and miss with it?

MRS. HILL: She took it for about two years. What she did learn in those two years, she did very well.

THE WITNESS: Her forte was dancing and that sort of thing. She was a cheerleader. She was the elite of Brighton High School. The president, the student body president was in their group. They were just really good, clean kids. They were leaders. They were just cream of the crop, you might say. She had that ability to mix with all of those kids. They liked her.

MR. WILLIAMS: You say she was a cheerleader. Was that a sophomore or freshman cheerleading group?

MRS. HILL: Sophomore.

MR. WILLIAMS: It wasn't the varsity cheerleading?

MRS. HILL: She would have been her junior year. She was junior varsity. She was elected.

THE WITNESS: But she never got to fulfill that.

MR. WILLIAMS: What other clubs or activities at school did she engage in?

MRS. HILL: She was in DECCA Club.

MR. WILLIAMS: Anything else?

MRS. HILL: In fashion class. I think she took gymnastics, too. That helped her in her cheerleading, anyway. She also took a dance class from a private individual.

THE WITNESS: She also worked.

MRS. HILL: One thing she did is she cut a lot of -- she had a lot of clientele in our neighborhood in school. She cut my hair and permed. I didn't to go a beauty shop for about three years. She cut his hair, too.

MR. WILLIAMS: That was for a period of how long?

MRS. HILL: About two years, she did that. She couldn't charge a fee but people would give her money. They would say, How much do you charge? She would say, I can't charge you, but they would pay her.

MR. WILLIAMS: Have you ever sat down and calculated the amount of money she saved you, for example?

MRS. HILL: On perms alone, probably $100 or more.

MR. WILLIAMS: Did she cut the other children's hair?

MRS. HILL: She did all of our hair, everybody's hair. Did she even do Troy's? She did Troy's hair, too.

MR. WILLIAMS: She cut Troy's hair, too?

MRS. HILL: Yes. Like I say, she was talented. It sounds like she might have been a little frivolous. She had talent in every area. If we talked about her four years later, I am sure she would have definite --

THE WITNESS: We talked to all of her teachers on the parent-teacher conference.

MRS. HILL: She had no enemies.

THE WITNESS: She always participated in the discussions and was constructive.

Q (By Mr. Williams) Did she have any special awards that she had received or achievements, school or otherwise?

A We thought being selected to cheerleader was quite an achievement twice in a row. And her modeling.

MRS. HILL: In junior high she was class representative several times. They got awards for that.

THE WITNESS: She was very active in her church work.

MRS. HILL: She had started to inquire about Junior Miss. She wanted to be in that pageant. In fact, my doctor called me and said, I know a lady that is in charge of this. I think you ought to sign her up for that. My doctor.

THE WITNESS: She had a lot of poise and confidence and

feminine grace.
Q (By Mr. Williams) Did she indicate any plans for college?
A Yes.
MRS. HILL: She wanted to go to Rick's College. That's where we are from.
THE WITNESS: She was dyed-in-the-wool LDS. She was active in the church. She wanted to go to Rick's College. She wanted to marry a returned missionary. She was a very religious girl. She was very close to her Father in Heaven.
Q (By Mr. Williams) I take it that other than the babysitting jobs and the money she would get on the occasion for cutting hair, her support was pretty much provided by you as parents; is that correct?
A Yeah. She made most of her own spending money, but we always --
Q Did she ever file any income tax returns?
A We have got some W-2s from that job and that's about all, two days worth.
Q Did she ever pay any money to you as the parents, for any reason?
A No. She wasn't obligated to. She may have borrowed five bucks from time to time and paid it back or something like that.
Q There was no payment for room and board and things like that?

A None of that. She was only 16. Oh, no.

Q She was never in trouble with the law, I take it?

A No.

MR. WILLIAMS: Did she have a driver's license at the time?

MRS. HILL: She had turned 16 in January and she had been out there twice to take it. That's the only test she couldn't pass. That's not unusual, though, for kids that age. Our oldest daughter went out there four times before she passed.

Q (By Mr. Williams) I suppose other than clothes and incidental things, she didn't have any assets or property of note?

A No.

Q Did she have a checking account, savings account?

A Savings account. She may have had, what, $15 or $20 in it. She wasn't much for saving. I am the one that got her to open that account.

Q Other than the services for hair, cutting hair and permanents, just briefly tell me what other services or activities she was involved in that supported the family.

A Well, gee, she tended her younger brother and sisters. They loved her.

MRS. HILL: She fixed dinner.

THE WITNESS: She did the housework. She helped her mother around the home.

MRS. HILL: I worked for many years. She had to take on the responsibility. At that time there was five of them. So the older girls had to -- they took turns babysitting for me after school.

Q (By Mr. Williams) How tall was she?

A 5'8".

MRS. HILL: I don't think she was quite that.

THE WITNESS: She was almost as tall as I was.

MR. WILLIAMS: How much did she weigh at the time of her death, do you know?

MRS. HILL: 115. I have got a better picture here.

MR. WILLIAMS: I would like to see a picture, if you have one, when we take a break.

Q (By Mr. Williams) How did she relate to the other children?

A Very well.

Q Were there disputes more than the ordinary between her and the other children?

MRS. HILL: Heavens no. She was the peacemaker.

THE WITNESS: She was too kind-hearted. Even when she would get physically incapable of handling her older sister. She couldn't fight.

Q (By Mr. Williams) Let's just take the year prior to her death, Mr. Hill. How much time did you spend with her alone on an average?

A That's a good question. Not as much as I would have liked. I usually waited up for her when she came home from a date. She was a real good kid that way. And sometimes we would sit at the table and talk after dinner. And on Sundays we spent some time together. Like I say, we had a good rapport. She had an understanding. I have had a better relationship with her than any of my other daughters. She had an understanding that was beyond her years. She was my confidant.

Q You confided in her with some of your problems? Is that what you are saying?

A Yes.

Q That provided you some comfort, did it?

A A lot of comfort.

Q Would you say that you talked with her alone on a personal basis more than once a month during the year prior to her death?

A Yeah. I even made a rule that she wouldn't go out so much. Because she was going out a lot with her friends, in cars. I have a piece of paper that I had her sign under objection that she would reduce her outings. Because at that age you want to be with your kids but you can't because they are out, running around with their friends. That was always a source of disappointment to me. She was so busy that I -- she went out in the evenings. Sometimes I would work

evenings. I just couldn't.
Q Other than Troy, who were her closest friends before she died?
A Male or female?
Q Both.
A Well, there was Debbie Karren and there was Debbie Miles.
MRS. HILL: Karen Cutler.
THE WITNESS: Karen Cutler. Was Trent one of her close friends?
MRS. HILL: He was Debbie's boyfriend. Trent Wolfert. And Wendy Poulsen was close to her at that time.
THE WITNESS: Then that kid that went on a mission.
MRS. HILL: Lance Rawl.
THE WITNESS: He was a friend but not as far as the one --
MRS. HILL: Whiting. What was his first name?
MR. WILLIAMS: That's good enough.
THE WITNESS: There was a whole group of kids that ran around together.
Q (By Mr. Williams) Did she have any health problems?
A None.
MRS. HILL: She had had braces.
THE WITNESS: That was not a health problem. She was the healthiest kid.
MR. WILLIAMS: Mr. Hill, I appreciate that. That's all

I have. Thank you.

EXAMINATION

BY MR. LAUCHNOR:

Q Bob, after you hired Keith Nelson, as I understand it, and correct me if I am misstating anything, Keith related to you, that is Keith and his associate, that they had thoroughly, in their mind, checked out the possibilities of recovering anything against the bar or these older folks that were the parents of this young boy, and decided that there wasn't anything, any liability there that they could find to get any further funds?

A That's right. That was the conclusion.

Q As I understand it, when you went in to Keith, you had already been offered the policy limits on the CUMIS policy, and Keith took the case on the condition that if he could find some additional funds he would take a contingent fee. If he couldn't, he would withdraw and return the case back to you to settle?

A That's right. I forgot that, but that's exactly what it was.

Q I want to make sure I understand it, too.

MR. WILLIAMS: Can I interrupt you a minute?

MR. LAUCHNOR: Sure.

MR. WILLIAMS: Do you have any problem with me going through his file while you ask him questions?

MR. LAUCHNOR: No.

Q (By Mr. Lauchnor) Then from that point on, Bob, as I understand it, you were told by Greg Winget and Mary Cornevaux at CUMIS Mutual, when you went back to them to tell them that you were ready to take the money, that they had had a demand on the money by State Farm?

A Uh-huh (affirmative).

Q And the demand was for the collision to be taken out first, the collision money?

A Right.

Q Paid on the car and the death benefits paid under the PIP? They wanted that out of there first?

A (The witness nods head in the affirmative.)

Q Could you answer out loud, please.

A Yes.

Q Then, as I understand it, so it is clear, the matter was then taken up by Mr. Caldwell, going to State Farm, and, as you understood it, after a discussion that he had with State Farm, they agreed to not make a claim for their PIP or the death benefits, they would waive that, but they insisted on getting the money for the repairs of the car out of the benefits that were on the insurance policy --

A That's right.

Q -- of CUMIS? Was it at that time that you went back to CUMIS and, I understand it, they told you that they couldn't

release all of the funds with the claim of State Farm on there unless they included them on a check as well, State Farm?

A That's right.

Q You employed me, and I negotiated that they release an even division of the funds that were available under the policy to you and Mr. Caldwell, with a separate check payable to Mr. Caldwell and State Farm, so that we could in other words litigate, if necessary, whether or not State Farm was entitled to that money; is that correct?

A Yes.

MR. WILLIAMS: Can I have a standing objection to all of these questions as being leading?

MR. LAUCHNOR: Sure. You can as to the last one, anyhow.

Q (By Mr. Lauchnor) Approximately how long would you say it was from the time you went back to CUMIS to get a settlement of the case, after talking to Keith Nelson, and the time you actually were able to get some funds with my help? About how many months?

A It was at least four and a half months, I believe. If I could remember exactly the date of that deposition that this Brown took, that was the turning point. We got them to -- we got Keith to release as quickly as possible. And I started to pursue that.

Q Did State Farm know that you had filed a lawsuit against the boy and the other people involved? Did you tell them that

this was going on when you were talking to them?

MR. WILLIAMS: I am not sure it is established that he talked to State Farm.

Q (By Mr. Lauchnor) Did you ever talk to any adjusters at State Farm?

A I am not sure I did. Dean was always talking to them. So he was --

Q I am trying to find out, did you ever personally talk to any of the State Farm adjusters about your case?

A Only Mr. Davis at the outset.

Q At that time had a suit been filed?

A No.

Q Your only recollection is that you didn't talk to State Farm after that? It was Mr. Caldwell that did?

A Yeah. I didn't need to.

MR. LAUCHNOR: That's all I have.

FURTHER EXAMINATION

BY MR. WILLIAMS:

Q Just a couple of things, quickly. I noted that you brought with you a file that contains some information. Can you describe for me just generally what this file was for?

A It was just going through, looking for anything this morning that pertained to this. I just picked up what I thought might be helpful. It contained the officer's report, and the letter of Keith Nelson taking the case, and it had

some notes that I had taken, and it had a remittal slip from State Farm when they paid the death benefits, or $5,000 of them. Just things that pertained to the whole process from the time Tammy was killed.

MR. WILLIAMS: Would you have any objection if we copied the contents of this file, attach them?

MR. LAUCHNOR: Yes, I would. If you want to make a motion to produce. I haven't even seen it. I don't know what is in it. Maybe I won't, after I see it. I don't know if there is anything in there confidential from Keith.

MR. WILLIAMS: I may not file a motion.

MR. LAUCHNOR: I don't know. Rather than just say so, I would have an objection, at least until I have looked at it.

Q (By Mr. Williams) There is one letter that I just -- one set of notes that I would like to ask you about that is dated July 7 of 1982. It has a list of about 12 names with telephone numbers.

A That's when the actual court case against Paul Bryan was to take place, and everybody -- from the Caldwells we found out that everybody that had been in attendance at those court sessions were in favor of Paul Bryan, and there was no one there in support of our side. And so I didn't feel like going to the thing because I didn't want to see this Bryan.

MR. LAUCHNOR: Is this the criminal case?

THE WITNESS: Yes. So we called several people and asked

them if they would attend, friends and neighbors. So that's what I did. And those several of them did agree to attend. Some weren't able to. I just took notes of what happened.

MR. WILLIAMS: That's all I have.

FURTHER EXAMINATION

BY MR. LAUCHNOR:

Q Just one other question, Mr. Hill. Did you ever talk to Greg Winget at CUMIS Mutual when you went back to accept the funds as to why he couldn't give you all of the money?

MR. WILLIAMS: It has been asked and answered.

THE WITNESS: Yes. We went over that several times.

Q (By Mr. Lauchnor) Have we already covered that today?

A That was the basis of most of our conversations, was I don't think it is right, plus the fact that he wasn't about to pay any money.

Q Did he say why he was withholding the money?

A Well, yeah, because State Farm was contesting it. His hands were tied, I guess.

MR. LAUCHNOR: That's all I have.

FURTHER EXAMINATION

BY MR. WILLIAMS:

Q Let me follow up with just one additional question. Did he indicate to you one way or another whether he agreed with State Farm's position?

A He may not have made a statement in so many words but

he -- by all of his actions and indirectly, he did, because the ultimate -- the outcome was he didn't change his position. There was one occasion where we -- you know, it was pretty serious, as far as I am concerned, because there was some reasons given that I didn't even think were valid.

Q Tell me about those.

A Well, he lied to me on one occasion.

MR. LAUCHNOR: Who is this?

THE WITNESS: Greg.

MR. LAUCHNOR: What did he say?

THE WITNESS: I can't remember but it had something to do with his home office. They kept telling us that the checks were going to be done and then they never were. That's what it was. He kept telling me -- I think we got to a point where they were going to make the checks or they were going to agree. And then they changed their position and went the other direction. And it was all home office. And that -- yeah. That was -- I think that was after the fact. Because it took a long time after we got these final depositions to get the check. Didn't we?

MR. LAUCHNOR: I don't recall any depositions.

THE WITNESS: Excuse me. These statements.

MR. LAUCHNOR: Releases?

THE WITNESS: These releases.

MR. LAUCHNOR: It was after the releases.

THE WITNESS: It turned out to be a very poor relationship.

MR. WILLIAMS: Thanks.

(Whereupon, at 12:33 p.m. this deposition was concluded.)

C E R T I F I C A T E

STATE OF)
:
COUNTY OF)

I HEREBY CERTIFY that I have read the foregoing testimony consisting of 62 pages, numbered from 3 to 64, inclusive, and the same is a true and correct transcription of said testimony except as I have corrected it in ink, giving my reasons therefor and affixed my initials thereto.

_____
ROBERT KENT HILL

* * *

Subscribed and sworn to at _____, this _____ day of _____, 1984.

_____
NOTARY PUBLIC

My commission expires:

_____

C E R T I F I C A T E

STATE OF UTAH)
:
COUNTY OF SALT LAKE)

THIS IS TO CERTIFY that the deposition of ROBERT KENT HILL, the witness in the foregoing deposition named, was taken before me, BRAD J. YOUNG, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, residing at Salt Lake City, Utah.

That the said witness was by me, before examination duly sworn to testify the truth, the whole truth and nothing but the truth in said cause.

That the testimony of said witness was reported by me in Stenotype and thereafter caused by me to be transcribed into typewriting, and that a full, true and correct transcription of said testimony so taken and transcribed is set forth in the foregoing pages numbered from 3 to 64 inclusive, and said witness deposed and said as in the foregoing annexed deposition.

I further certify that after the said deposition was transcribed, the original of same was held at the offices of Associated Professional Reporters, 420 Kearns Building, Salt Lake City, for the witness to read, signed before a Notary Public, and to be returned to me for filing with the Clerk of the said Court.

I further certify that I am not of kin or otherwise associated with any of the parties to said cause of action, and that I am not interested in the event thereof.

WITNESS MY HAND and official seal of Salt Lake City, Utah, this 30th day of Aug, 1984.

My commission expires:

December 8, 1986

Brad J Young

BRAD J. YOUNG

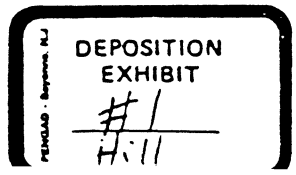
RELEASE OF ALL CLAIMS

FOR AND IN CONSIDERATION of the payment to the undersigned at this time of the sum of TWENTY TWO THOUSAND TWO HUNDRED FORTY FIVE AND NO/100 DOLLARS ($22,245.00), the receipt of which is hereby acknowledged, the undersigned, being of lawful age, individually, as parents, natural guardians, and representatives of the estate of Tamara Elaine Hill, and for and on behalf of the heirs of Tamara Elaine Hill, deceased, do hereby release, acquit, and forever discharge KENNETH PAUL BRYAN, FARRELL L. BRYAN, ILENE M. BRYAN, NORMAN L. BROWN, dba THE SPOT II, their agents, servants, employees, and insurers, of and from any and all actions causes of action, claims, demands, damages, costs, loss of services, loss of society, comfort, and companionship, expenses, loss of income or other compensation, on account of or in any way growing out of all known and unknown injuries and/or damages, resulting or to result from that particular automobile accident that occurred on or about the 6th day of June, 1982, at or near the intersection of 3900 South Street and 7th East Street in Salt Lake County, State of Utah, wherein a vehicle operated by Kenneth Paul Bryan collided with a vehicle in which Tamara Elaine Hill was riding, resulting in her death.

THE UNDERSIGNED HEREBY DECLARE AND REPRESENT that in making this release and agreement, it is understood and agreed that the undersigned rely wholly upon their own judgment, belief, and knowledge of the nature and extent of said damages, and that the undersigned have not been influenced to any extent whatsoever in making this release by any representations or statements regarding the accident, or regarding any other matters, made by the persons, firms, or corporations who are hereby released, or by any person or persons representing them.

IT IS FURTHER UNDERSTOOD AND AGREED that this settlement is the compromise of a doubtful and disputed claim, and that the payment made pursuant to this release is not to be construed as an admission of liability on the part of the parties released hereunder, by whom liability is expressly denied.

THE UNDERSIGNED UNDERSTAND AND AGREE that the accident resulting in the death of Tamara Elaine Hill, described in this release of all claims, may have caused damages, the existence of which and the consequences of which are now unknown but which



may become known in the future. The undersigned nevertheless intend to and do release, for and on their own behalf, on behalf of the estate of Tamara Elaine Hill, and on behalf of all the heirs of the estate of Tamara Elaine Hill, all claims for all injuries and damages to the undersigned, the estate and/or the heirs of the estate of Tamara Elaine Hill, whether now known or unknown and whether now in existence or hereafter to arise.

IT IS UNDERSTOOD that the above amount of TWENTY TWO THOUSAND TWO HUNDRED FORTY FIVE AND NO/100 DOLLARS ($22,245.00) represents TWENTY FIVE THOUSAND AND NO/100 DOLLARS ($25,000.00) policy limits less the collision claim of FIVE THOUSAND FIVE HUNDRED TEN AND NO/100 DOLLARS by State Farm Mutual Insurance Company, wherein a controversy exists as to who is entitled to the said amount, and that the matter will be resolved between the two or by payment into court or by judicial determination.

IT IS FURTHER UNDERSTOOD AND AGREED that should the undersigned commence legal action against any third party, not released under this release, for the injuries and damages resulting from the accident and subsequent death of Tamara Elaine Hill as described in this release, that such third party will be entitled to a setoff for the amounts paid under this release or the percentage of responsibility that might be attributable to the parties released herein, if any, whichever is greater, and this release is intended to comply with the provisions of Section 78-27-42 and Section 78-27-43 of Utah Code Annotated, as amended.

THIS RELEASE, contains the entire agreement between the parties hereto, and the terms of this release are contractual and not a mere recital.

THE UNDERSIGNED FURTHER STATE that they have carefully read the foregoing release and know the contents thereof, and the undersigned sign the same as their own free act.

DATED this ____ day of March, 1983.

ROBERT KENT HILL, Individually and as Father, Natural Guardian, and Representative of the Estate and Heirs of Tamara Elaine Hill

JANET WEBER HILL, Individually and as Mother, Natural Guardian, and Representative of the Estate and Heirs of Tamara Elaine Hill

Witness:

_____

Tab H

5 5 89

Glenn C. Hanni, A1327
STRONG & HANNI
Attorneys for Defendant
Sixth Floor Boston Building
Salt Lake City, Utah 84111
Telephone: (801) 532-7080

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ROBERT KENT HILL, individually and as personal representative of the heirs of TAMARA ELAINE HILL, deceased, and LORIN DEAN CALDWELL, individually and as personal representative of the heirs of TROY NEIL CALDWELL, deceased, Plaintiffs, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant.	MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFF HILL AND PARTIAL SUMMARY JUDGMENT AS TO PLAINTIFF CALDWELL Civil No. C83-8099 Judge Young

STATEMENT OF MATERIAL FACTS AS TO WHICH DEFENDANT STATE FARM CLAIMS NO GENUINE ISSUE EXISTS

1. Plaintiff Lorin Dean Caldwell (hereinafter "Caldwell") at all times relevant to this action, was the owner of an automobile insured by State Farm Mutual Automobile Insurance Company (hereinafter "State Farm") which was involved in a collision on June 6, 1982, while Caldwell's son, Troy, was driving the automobile, and Robert Kent Hill's (hereinafter "Hill") daughter, Tamara, was riding as a passenger in Caldwell's

0000211

automobile. The automobile accident was with a vehicle driven by Kenneth Paul Bryan (hereinafter "Bryan"), and the collision resulted in the deaths of Caldwell's son and Hill's daughter, both minors at the time. [See Plaintiffs' Complaint, paras. 1, 3-6.]

2. Hill had no ownership interest in the automobile driven by Troy Caldwell at the time of the accident. [Plaintiffs' Complaint, paras. 1, 9.]

3. As a result of the accident, Caldwell's automobile was damaged, and State Farm paid Caldwell $5,510 under the terms of the insurance policy for collision damage to the automobile. [Caldwell Depo., p. 11.]

4. Caldwell received no-fault benefit payments from State Farm of $6,539.00, and Hill received no-fault benefit payments from State Farm in the amount of $6,120.00. [See Affidavit of Grant Cutler attached to State Farm's Memorandum in Support of Motion For Summary Judgment dated 9-12-84, unsigned copy attached hereto as Exhibit B.]

5. The policy of insurance between State Farm and Caldwell included a condition regarding subrogation which states, in pertinent part:

> Subrogation. Upon payment under this policy, . . . the company shall be subrogated to all the insured's rights of recovery therefor and the insured shall do whatever is necessary to secure such rights and do nothing to prejudice them. [Certificate of Certified Policy and copy of policy attached hereto as Exhibit A.]

6. Section III of the insurance policy, entitled "Physical Damage Coverages Insuring Agreements," provides for

collision coverage under Coverage G, which states:

> To pay for loss to the owned motor vehicle caused by collision but only for the amount of each such loss in excess of the deductible amount stated in the declarations as applicable hereto. If the deductible amount is $100 or less it shall not apply if the collision is with another motor vehicle insured with this company.

7. The definitions contained in Section III of the policy include the following:

> Collision--means collision of a motor vehicle covered by this policy with another object or with a vehicle to which it is attached or upset of such motor vehicle.
>
> * * * *
>
> Loss--wherever used with respect to coverages D, F, G, R and R1, means each direct and accidental loss of or damage to
>
> (1) an owned motor vehicle, or
>
> (2) its equipment.
>
> Under coverages D, F, and G, loss includes direct and accidental damage to wearing apparel and luggage.
>
> Owner Motor Vehicle--Means the motor vehicle or trailer described in the declarations, and includes a temporary substitute automobile and a newly-acquired automobile. [See Exhibit A attached hereto.]

The owned motor vehicle applicable to the policy of insurance at issue in this case was a 1979 Honda two-door vehicle. That is the vehicle which was owned by Caldwell. [See Declaration Sheet of Exhibit A, attached hereto.]

8. Cumis Insurance Society Inc. (hereinafter "Cumis")

was the insurer for Bryan. It had a $50,000 single limit liability policy and offered to pay its $50,000 limit to Caldwell and Hill ($25,000 each) in exchange for a complete and full release of all claims of Caldwell and Hill. This offer was made the first time Cumis' representative talked to Caldwell and Hill, but Caldwell and Hill wanted to obtain legal advice and investigate other possible defendants and sources of recovery before signing any papers and did not accept the offer. [Caldwell Depo., pp. 14-15, 21-22; Hill Depo., pp. 16-17, 24-25, 27-28.]

9. After Hill's and Caldwell's respective lawyers had completed their investigation of the matter and determined that pursuing a lawsuit would not be productive, Caldwell and Hill went back to Cumis expressing a desire to settle for the original offer of $25,000 each. Cumis had since been put on notice by State Farm of its subrogation claim for the $5,510 in property damage, and Cumis would not release the full $50,000 to Caldwell and Hill without also paying State Farm its $5,510. [Caldwell Depo., pp. 22-23; Hill Depo., pp. 34-36.]

10. Ultimately, Caldwell and Hill and their wives signed separate releases in favor of Bryan, Cumis and others. [Hill Depo., pp. 41-43, 45; Exhibit 1; Caldwell Depo., pp. 25-26, 31; Exhibit 1.] The release signed by Caldwell and his wife recited consideration of $27,755 and specifically stated that $5,510 of that recited consideration "represents damage to the undersigned's automobile and that such amount will be made payable by separate

check to State Farm Mutual Insurance Company and Lorin D. Caldwell, wherein a controversy exists between State Farm Mutual Insurance Company and Lorin D. Caldwell as to who is entitled to the said amount, and that the matter will be resolved between the two or by payment into court or by judicial determination." [Caldwell Depo., Exhibit 1.]

11. Caldwell and Hill demanded that State Farm waive its subrogation claim for the $5,510 in property damage to Caldwell's automobile. Litigation ensued in which plaintiffs Hill and Caldwell brought suit against State Farm to recover the $5,510 and further seeking punitive damages for State Farm's alleged bad faith obstruction of plaintiffs' settlement. Plaintiffs' complaint does not allege any independent tort cause of action against Sate Farm. [See generally Plaintiffs' Complaint.]

12. State Farm filed a motion for summary judgment in this litigation as to all the claims of Hill and Caldwell on or about September 12, 1984. Judgment granting State Farm's motion for summary judgment was entered on October 22, 1984, from which plaintiffs appealed. The Supreme Court reversed the lower court's granting of summary judgment and remanded the case to the district court.

ARGUMENT

POINT I.

DEFENDANT HILL HAS NO CAUSE OF ACTION AGAINST STATE FARM BECAUSE HILL WAS NOT AN INSURED AND THERE WAS NO PRIVITY OF CONTRACT BETWEEN HILL AND STATE FARM WITH RESPECT TO THE PHYSICAL DAMAGE TO CALDWELL'S VEHICLE.

State Farm's right of subrogation under the terms of its policy with Caldwell grants to State Farm the right to "be subrogated to all the insured's rights of recovery" with respect to any payment made by State Farm under the policy. The $5,510 payment at issue in this case was made by State Farm to Caldwell for the damage done to Caldwell's vehicle. Hill was not an owner of that vehicle. Hill had no claim for property damage to the vehicle against the tortfeasor Bryan.

Therefore, as to the payment made by State Farm under the collision coverage provision of the policy, it was subrogated only to the rights of Caldwell, the owner of the vehicle.

This fact was recognized by Cumis and Caldwell in the release Caldwell signed where it was specifically stated that a separate draft was being made payable to State Farm and Caldwell for the $5,510 representing property damage.

83 C.J.S. Subrogation §1 defines subrogation "as the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt."

State Farm was substituting itself only in the place of

Caldwell with respect to the $5,510 because Caldwell was the only one who had received that payment from State Farm.

Therefore, insofar as the right of subrogation under the insurance policy is concerned, it only applied to the payment made by State Farm to Caldwell, and had no application whatsoever to Hill. Hill was not an insured under the policy for purposes of the right of subrogation asserted by State Farm because State Farm had not paid Hill anything for which State Farm was asserting a right of subrogation.

Since the Supreme Court's decision reversing State Farm's summary judgment, State Farm has paid the $5,510 plus interest to Caldwell. Thus, the only remaining claims at this point are for bad faith and punitive damages.

Plaintiffs' claims of bad faith arise in the context of a first-party insurance claim, i.e., the payment by State Farm of Caldwell's collision claim. Caldwell does not assert any bad faith conduct on the part of State Farm with respect to investigation of the property damage claim and payment thereof. Instead, Caldwell and Hill claim State Farm acted in bad faith by refusing to waive its subrogation claim and thereby obstructed Caldwell's and Hill's settlement with Cumis. Nonetheless, this claim of bad faith still arises out of the payment of a first-party insurance claim even though the actions that are alleged to constitute bad faith occurred after payment of the claim.

A similar situation arose in Amica Ins. Co. v. Schettler,

768 P.2d 950 (Utah App. 1989), which involved a claim of bad faith against the insurer for conduct which occurred after the insurer had paid the first-party claim. The Court of Appeals analyzed this case within the framework of Beck v. Farmers Ins. Exchange, 701 P.2d 795 (Utah 1985), the seminal Utah case which held there was a contractual implied duty of good faith and fair dealing in first-party insurance claims. Beck refused to recognize any tort cause of action for bad faith in first-party insurance claims.

In Schettler, Amica fully paid Schettler's first-party claim, but Schettler alleged that Amica acted in bad faith by its conduct subsequent to the time the first-party claim was paid. The Court of Appeals considered the allegation to be a first-party bad faith contract claim just the same as Beck.

Thus, Schettler held that conduct by an insurer after payment of a first-party claim which is alleged to constitute bad faith is still subject to the principle set forth in Beck that such a claim is a contractual claim only and not a tort claim.

In addition to asserting a claim against Amica, Schettler also asserted a bad faith claim against defendants NATB and Black & Guiver. The trial court granted summary judgment as to those defendants. On appeal, the Court of Appeals affirmed and stated:

> We find the claim against NATB and Black & Guiver without merit. There are no facts to establish (1) that a contractual relationship ever existed between Schettler and NATB or between Schettler and Black & Guiver, or

> (2) that the third-party defendants owed Schettler an independent duty outside a contractual relationship. . . .
>
> * * * *
>
> In order to maintain an action under a contractual theory of insurer bad faith, the parties must be in privity of contract at the time of the alleged wrong. Ammerman v. Farmers Ins. Exch., 19 Utah 2d 261, 430 P.2d 576, 577 (1967). . . . [768 P.2d at 957-958.]

Therefore, Schettler further holds that a party may not bring a bad faith claim unless that party stands in privity of contract to the insurer against whom the claim is being brought. Hill was not in privity of contract with State Farm as an insured with respect to the subrogation rights of State Farm under its policy with Caldwell. As a result, Hill cannot have a bad faith claim against State Farm for failure to waive its subrogation claim.

With respect to the privity of contract requirement, the Court of Appeals in Schettler cited the case of Ammerman v. Farmers Ins. Exch., supra. In Ammerman, the insured, and Eddie Soliz, a judgment creditor and party injured by the negligence of Ammerman, joined together to sue Farmers Insurance, Ammerman's insurer. The predicate for their suit against Farmers was that Farmers had refused to settle Soliz' claims for $9,000 prior to trial. As a result of a trial between Soliz and Ammerman, Soliz obtained a judgment against Ammerman for $15,282. This judgment was affirmed on appeal. Farmers then paid $10,000, its policy

limit. Thereafter, Soliz sued Farmers to recover the $5,280 balance of his judgment against Ammerman based on Farmers' alleged bad faith in refusing to settle prior to trial.

The Utah Supreme Court found that Soliz had not been damaged by Farmers' action in that Farmers' refusal to settle for $9,000 actually resulted in Soliz recovering a judgment for $10,000 from Farmers and having a judgment for $5,180 against Ammerman. Additionally, and of vital importance to the instant case, the Utah Supreme Court held that Soliz had no standing to bring suit against Ammerman's insurer:

> In assessing the claimed right of Soliz to take this cause of action for himself, the first problem presented is that at the time of the alleged wrong by the defendant company, it had no privity of contract with Soliz and therefore owed him no duty, so there could be no breach thereof. . . . [430 P.2d at 577]

Although Ammerman involved a third-party claim of bad faith, the principle enunciated with respect to the need for privity of contract is valid even in the instant case where we are dealing with a first-party claim. The Utah Supreme Court again cited with approval the privity concept from Ammerman in the more recent case of Auerbach Co. v. Key Security Police, Inc., 680 P.2d 740 (Utah 1984). If there is no privity of contract, there is no duty owed by State Farm to Hill, and there can be no claim for first-party bad faith by Hill against State Farm.

POINT II.

NEITHER HILL NOR CALDWELL ARE ENTITLED TO PUNITIVE DAMAGES BECAUSE THEIR CLAIMS AGAINST STATE FARM ARE CONTRACT CLAIMS, AND THERE IS NO INDEPENDENT TORTIOUS CONDUCT.

As indicated in Point I, above, the claims of bad faith asserted by plaintiffs in this case against State Farm arise out of State Farm's assertion of its subrogation right under its contract of insurance subsequent to payment of a first-party claim for property damage. Thus, plaintiffs' claims of bad faith are for bad faith in the first-party insurance context, as enunciated in Beck, supra. Punitive damages are not awardable for breach of contract. There must be some independent tortious conduct aside from the contract breach. In Hal Taylor Assoc. v. Unionamerica, Inc., 657 P.2d 743 (Utah 1982), the Utah Supreme Court stated:

> We prefer the standard articulated by the Kansas Supreme Court . . . which states that breach of contract, standing alone, does not call for punitive damages even if intentional and unjustified, but such damages are allowable if there is some independent tort indicating malice, fraud or wanton disregard for the rights of others. . . . [657 P.2d at 750]

In Beck, supra, the Supreme Court clearly stated that bad faith in a first-party insurance claim case is a breach of a contractual duty only, and does not give rise to a tort cause of action. The court further stated there is no fiduciary relationship between the insurer and the insured in a first-party insurance claim context. Beck also indicated that an insured in a

first-party bad faith claim can recover "both general damages, i.e., those flowing naturally from the breach, and consequential damages, i.e., those reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made." [701 P.2d at 801] Punitive damages are not general damages or consequential damages.

In a concurring opinion in the case of Gagon v. State Farm Mut. Auto. Ins. Co., 92 U.A.R. 21 (Sept. 28, 1988), Justice Zimmerman agreed with the Supreme Court's refusal to grant a petition for certiorari, but Zimmerman made very clear that bad faith in a first-party context does not give rise to a claim for punitive damages. He stated:

> Specifically, the trial judge may feel compelled to permit the jury to award punitive damages if Gagon shows nothing more than a breach of the Beck covenant of good faith. To do so would be error under Beck. . . .
>
> In Beck, we were very careful to make it plain that a claim for an insurer's breach of its implied covenant to act in good faith toward its insured did not, alone, give rise to a cause of action in tort; rather, the cause of action is one in contract. While consequential damages for breach of the covenant would be available, tort damages, including punitive damages, would not. To recover punitive damages, a plaintiff would have to show all of the elements of a separate tort. . . . Accordingly, under Beck, a plaintiff is not entitled to put on evidence of punitive damages unless he or she can make out a sufficient case to go to the jury on an independent tort theory.

There being no claim for any independent tortious conduct against State Farm in the instant case, there is no basis for punitive damages to be awarded, as a matter of law, for either Hill or Caldwell.

SUMMARY

State Farm owed no duty to Hill with respect to the subrogation provision in the insurance policy because Hill was not an insured for purposes of that provision and had no privity of contract with State Farm. State Farm was stepping into the shoes of Caldwell only when it asserted its subrogation right. There being no duty owed to Hill, all his claims for bad faith and punitive damages should be dismissed.

There is no basis for a punitive damage award in favor of Hill or Caldwell because their claims arise out of contract and not tort.

State Farm respectfully requests the court to grant summary judgment in its entirety as to all claims of Hill and to grant summary judgment as to the punitive damage claim of Caldwell.

DATED this 4th day of May, 1989.

STRONG & HANNI

By _____
Glenn C. Hanni
Attorneys for Defendant

S26-MSUMnh

0000223

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May, 1989, a true and correct copy of the foregoing MEMORANDUM was hand-delivered to:

Wallace R. Lauchnor
PAULSON, LAUCHNOR & DAVIS
Attorneys for Plaintiffs
CSB Tower, Suite 500
50 South Main Street
Salt Lake City, Utah 84144

J. Webster
Secretary

CERTIFICATE OF CERTIFIED POLICY

I, the undersigned, do hereby certify that I am custodian of the records pertaining to the issuance of policies by the Utah Division for State Farm Mutual Automobile Insurance Company of Bloomington, Illinois.

I further certify that the attached Policy #4653-327-D10-44A is a copy of the policy issued to Lorin Dean and LaRue Caldwell of 7311 Chris Lane, Salt Lake City, Utah 84121, together with any endorsements issued subsequently, based on our available records. This policy was in full force and effect on the accident date of June 6, 1982.

Gale Darnell
Operations Superintendent

STATE OF COLORADO

COUNTY OF WELD

Subscribed and sworn to before me this twenty second day of February, 1989.

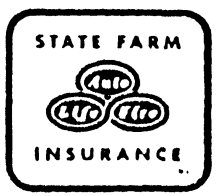
Vicki K. Hughes
Notary Public

MY COMMISSION EXPIRES: August 21, 1991

EXHIBIT A

0000225

COPY



STATE FARM MUTUAL
Automobile Policy

State Farm Mutual Automobile Insurance Company, Home Office: Bloomington, Illinois

THE ADDRESS OF THE REGIONAL OFFICE
WHICH ISSUED THIS POLICY IS SHOWN
AT THE TOP OF THE DECLARATIONS
CONTINUED PAGE ENCLOSED HEREIN

Authorized Representative

0000226

DECLARATIONS

1. POLICY PERIOD: The policy period shall be as shown under "Policy Period" and for such succeeding periods of six months each thereafter as the required renewal premium is paid by the named insured on or before the expiration of the current policy period. The "Policy Period" shall begin and end at 12:01 A.M., standard time at the address of the named insured as stated herein. The premium shown is for the policy period and coverages indicated in the declarations.

2. GARAGED: The *owned motor vehicle* will be principally garaged in the declared town and *state*.

3. INSURANCE AND LICENSE HISTORY: Unless stated in the exceptions (a) no insurer has canceled vehicle insurance issued to the named insured or any member of his or her household within the past three years, and (b) no license to drive or registration has been suspended, revoked or refused for the named insured or any member of his or her household within the past three years.

4. OWNER: The named insured is the sole owner of the described motor vehicle except as stated in the exceptions.

5. LIENHOLDER: If a mortgage owner, conditional vendor, or assignee is named in the exceptions, *loss*, if an under coverages D, F and G shall be payable to the named insured and to such additional interest as such interest may appear, and this insurance as to such additional interest shall not be invalidated by any act or negligence of the mortgagor or owner, nor by any change in the title or ownership, nor by any error or inadvertence in the description of the motor vehicle until after notice of termination of the policy shall be given to such mortgage owner, conditional vendor, mortgagee or assignee stating when not less than 10 days thereafter such termination shall be effective; provided, the lienholder shall notify the company within 10 days of any change of interest or ownership which shall come to the knowledge of said lienholder and failure to do so will render this policy null and void.

Whenever the company shall pay the lienholder any sum for *loss* under this policy and shall claim that, as to the named insured, no liability therefor existed, the company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the debt. The company may, at its option, pay off the mortgage debt and require an assignment thereof and of the mortgage or other lien and all such other securities; but no subrogation shall impair the right of the lienholder to recover the full amount of its claim.

6. PURPOSE OF USE: The purposes for which the *owned motor vehicle* is to be used are "pleasure and business" unless otherwise stated in the exceptions. (a) The term "pleasure and business" is defined as personal, pleasure, family and business use. (b) The term "commercial" or "commercial-farm" is defined as use principally in the business occupation of the named insured as stated in the exceptions, including occasional use for personal, pleasure, family and other business purposes.

7. UNDER COVERAGE S each *insured resides* in the named insured's household.

M

2
8440

0000227

STATE FARM INSURANCE

Declarations Continued

State Farm Mutual Automobile Insurance Company

REGIONAL OFFICE

Mountain States Off Greeley Co 80631

FORM G 41781

NAMED INSURED

Caldwell, Lorin
Dean & La Rue
7311 Chris Ln
Salt Lake City
Ut 84121

THIS PAGE, ANY ENDORSEMENTS INDICATED HEREON AND FORM 9844. CONSTITUTE THE POLICY IDENTIFIED BY THE POLICY NUMBER.

COPY

POLICY NUMBER
4653-327-D10-44A

POLICY PERIOD (MONTH-DAY-YEAR)
Apr 02,79 to Oct 10,79

LIMITS OF LIABILITY

	(THOUSANDS DOLLARS) A		B	(DOLLARS) C	(THOUSANDS DOLLARS) U			P
YEH	EACH PERSON	EACH ACCIDENT	EACH ACCIDENT	EACH PERSON	BODILY INJURY EACH PERSON	BODILY INJURY EACH ACCIDENT	[illegible]	(INCLUDED) [illegible]
	25	50	25		15	30	XXXXX	XXXXX

DESCRIBED VEHICLE/MAKE-YEAR-BODY STYLE-NUMBER / & COVERAGES AS DEFINED IN POLICY

Honda 79 2DR SNF1006463
COVERAGES: AB D G100 H U P3

PREMIUM FOR POLICY PERIOD SHOWN
$117.24

COVERAGES:

COVERAGES:

COVERAGES:

EXCEPTIONS AND ENDORSEMENTS

6256G. 6382L - Amend. End. Financed - Utah Power and Light Cr Und, 41 N Redwood Rd, Salt Lake City Ut 84116.

Current Semi Annual Premium
$112.80

PERSONS INSURED COVERAGE $ (AMOUNTS)

REPLACED POLICY 4653327-44

Countersigned _____, 19____

By _____ AGENT 1178

Attach this page to 9844.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

BLOOMINGTON, ILLINOIS

A Mutual Insurance Company Herein Called the Company

Agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to all of the terms of this policy

(NOTE. The words in ***bold face italic*** type are defined under Definitions within each Section.)

SECTION I—LIABILITY COVERAGES

INSURING AGREEMENTS

COVERAGE A—BODILY INJURY LIABILITY

COVERAGE B—PROPERTY DAMAGE LIABILITY

To pay on behalf of the ***insured*** all sums which the ***insured*** shall become legally obligated to pay as ***damages*** because of

(A) ***bodily injury*** sustained by other ***persons***; and

(B) ***property damage***,

caused by accident arising out of the ownership, maintenance or use, including loading or unloading, of the ***owned motor vehicle***; and to defend, with attorneys selected by and compensated by the company, any suit against the ***insured*** alleging such ***bodily injury*** or ***property damage*** and seeking ***damages*** which are payable hereunder even if any of the allegations of the suit are groundless, false or fraudulent; and the company may make such investigation, negotiation and settlement of any claim or suit, as it deems expedient. The company shall not be obligated to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

USE OF NON-OWNED AUTOMOBILES

If the named insured is a ***person*** or ***persons*** and if during the policy period such named insured owns a motor vehicle covered by this policy and classified as "pleasure and business", such insurance as is afforded by this policy with respect to the ***owned motor vehicle*** under coverages A and B applies to the use of a ***non-owned automobile*** by an ***insured***, PROVIDED SUCH USE, OPERATION OR OCCUPANCY IS WITH THE PERMISSION OF THE OWNER OR *PERSON* IN LAWFUL POSSESSION OF SUCH *AUTOMOBILE* AND IS WITHIN THE SCOPE OF SUCH PERMISSION.

As respects the "use of ***non-owned automobiles***" under coverages A and B, the definition of ***insured*** in Section I is changed to read:

Insured means:

(a) the first ***person*** named in the declarations, or

(b) that ***person's spouse*** or the ***relatives*** of either, and

(c) any ***person*** or organization not owning or hiring such ***automobile***, but only with respect to his or her or its liability for the use of such ***automobile*** by an ***insured*** in (a) and (b) above.

EXCLUSIONS—SECTION I

THIS INSURANCE DOES NOT APPLY UNDER:

(a) COVERAGES A AND B TO A *NON-OWNED AUTOMOBILE*

(1) WHILE MAINTAINED OR USED BY ANY *PERSON* WHILE SUCH *PERSON* IS EMPLOYED OR OTHERWISE ENGAGED IN AN *AUTOMOBILE BUSINESS* OF THE *INSURED* OR OF ANY OTHER *PERSON* OR ORGANIZATION, OR

(2) WHILE USED IN ANY OTHER BUSINESS OR OCCUPATION, except a ***private passenger automobile*** operated or occupied by the first ***person*** named in the declarations, his or her ***spouse*** or any ***relative*** of either;

(b) COVERAGES A, AND B WHILE THE *OWNED MOTOR VEHICLE* IS RENTED OR LEASED TO OTHERS BY THE *INSURED*, USED AS A PUBLIC OR LIVERY CONVEYANCE, OR USED FOR CARRYING *PERSONS* FOR A CHARGE, but the transportation on a share expense basis in a ***private passenger automobile*** of friends, neighbors, fellow employees or school children shall not be deemed carrying ***persons*** for a charge;

(c) COVERAGES A AND B WHILE THE *OWNED MOTOR VEHICLE* IS USED FOR THE TOWING OF ANY *TRAILER (OTHER THAN A TRAILER AS DEFINED* HEREIN) OWNED OR HIRED BY THE *INSURED* AND NOT COVERED BY LIKE INSURANCE IN THE COMPANY; OR WHILE ANY TRAILER COVERED BY THIS POLICY IS USED WITH ANY MOTOR VEHICLE OWNED OR HIRED BY THE *INSURED* AND NOT COVERED BY LIKE INSURANCE IN THE COMPANY;

(d) COVERAGES A AND B,

(1) TO LIABILITY ASSUMED BY THE *INSURED* UNDER ANY CONTRACT OR AGREEMENT; OR

(2) TO ANY OBLIGATION FOR WHICH THE UNITED STATES MAY BE HELD LIABLE UNDER THE FEDERAL TORT CLAIMS ACT;

(e) COVERAGES A AND B, TO THE *OWNED MOTOR VEHICLE* WHILE USED BY ANY *PERSON* WHILE SUCH *PERSON* IS EMPLOYED OR OTHERWISE ENGAGED IN AN *AUTOMOBILE BUSINESS* OF THE *INSURED* OR OF ANY OTHER *PERSON* OR ORGANIZATION, but this exclusion does not apply to the named insured and ***spouse*** and this insurance applies only as excess insurance over any other insurance, to a ***resident*** of the same household as the named insured, to a partnership in which said ***resident*** or the named insured is a partner, or to any partner, agent or employee of the named insured, such ***resident*** or partnership.

(f) COVERAGE A, TO ANY EMPLOYEE WITH RESPECT TO *BODILY INJURY* OF ANOTHER EMPLOYEE OF THE SAME EMPLOYER INJURED IN THE COURSE OF SUCH EMPLOYMENT ARISING OUT OF THE MAINTENANCE OR USE OF A MOTOR VEHICLE IN THE BUSINESS OF SUCH EMPLOYER, but this exclusion *does not apply to the named insured or spouse with respect* to an injury sustained by any such fellow employee;

(g) COVERAGE A,

(1) TO *BODILY INJURY* TO ANY EMPLOYEE OF THE *INSURED* ARISING OUT OF AND IN THE COURSE OF

(i) DOMESTIC EMPLOYMENT BY THE *INSURED*, IF BENEFITS THEREFOR ARE IN WHOLE OR IN PART EITHER PAYABLE OR REQUIRED TO BE PROVIDED UNDER ANY WORKMEN'S COMPENSATION LAW, OR

(ii) OTHER EMPLOYMENT BY THE *INSURED*; OR

(2) TO ANY OBLIGATION FOR WHICH THE *INSURED* OR HIS OR HER INSURER MAY BE HELD LIABLE UNDER ANY WORKMEN'S COMPENSATION, UNEMPLOYMENT COMPENSATION OR DISABILITY BENEFITS LAW, OR UNDER ANY SIMILAR LAW;

(h) COVERAGE A, TO *BODILY INJURY* TO ANY *INSURED* OR ANY MEMBER OF THE FAMILY OF AN *INSURED RESIDING* IN THE SAME HOUSEHOLD AS THE *INSURED*;

(i) COVERAGE B, TO INJURY TO OR DESTRUCTION OF PROPERTY OWNED OR TRANSPORTED BY AN *INSURED*, OR PROPERTY RENTED TO OR IN CHARGE OF AN *INSURED* other than a residence or *private garage injured or destroyed by a private passenger automobile* covered by this policy.

LIMITS OF LIABILITY

Coverage A. The limit of liability stated in the declarations as applicable to "each *person*" is the limit of the company's liability for all *damages* arising out of *bodily injury* sustained by one *person* in any one accident, and subject to this provision, the limit of liability stated in the declarations as applicable to "each accident" is the total limit of the company's liability for all such *damages* for *bodily injury* sustained by two or more *persons* in any one accident.

Coverage B. The limit of liability stated in the declarations as applicable to "each accident" is the limit of the company's liability for all damages to all property of one or more *persons* or organizations in any one accident.

Under coverages A and B, the inclusion herein of more than one *insured* shall not increase the limits of liability.

SUPPLEMENTARY PAYMENTS

As respects the insurance afforded under coverages A and B and in addition to the applicable limits of liability to pay:

(a) costs taxed against the *insured* in any such suit and, after entry of judgment, all interest accruing on the entire amount thereof until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon;

(b) premiums on bonds to release attachments not in excess of the applicable limit of liability, premiums on required appeal bonds, and the cost of bail bonds required of the *insured* because of accident or traffic law violation, not to exceed $250 per bail, bond, but without any obligation to apply for or furnish any such bonds;

(c) expense incurred by the *insured* for first aid to others at the time of an accident involving a motor vehicle insured hereunder;

(d) reasonable expense incurred by the *insured* at the company's request, including loss of wages or salary not to exceed $25 per day, if such loss is incurred because of the *insured's* attendance at trial of any civil lawsuit in defense against allegation of *bodily injury;*

PROVIDED THAT THIS INSURANCE DOES NOT APPLY TO EXPENSE UNDER PARAGRAPH (c) DUE TO *WAR.*

DEFINITIONS—SECTION I

Automobile—means a four wheel land motor vehicle designed for use principally upon public roads, but "automobile" shall not include a *midget automobile*, nor any vehicle while located for use as a residence or premises.

Automobile Business—means the business or occupation of selling, leasing, repairing, servicing, transporting, storing or parking of land motor vehicles or trailers.

Bodily Injury—means bodily injury, sickness or disease including death at any time resulting therefrom.

Damages—wherever used with respect to coverage A includes damages for care and loss of services.

Insured— the unqualified word "insured" includes

(1) the named insured, and

(2) if the named insured is a *person* or *persons*, also includes the *spouse(s)*, and

(3) any *relatives* of the first *person* named in the declarations, or of his or her *spouse*, and

(4) any other *person* while using the *owned motor vehicle*, PROVIDED THE OPERATION AND THE ACTUAL USE OF SUCH VEHICLE ARE WITH THE PERMISSION OF THE NAMED INSURED OR SUCH *SPOUSE* AND ARE WITHIN THE SCOPE OF SUCH PERMISSION, and

(5) under coverages A and B any other *person* or organization, but only with respect to such *person's* or organization's liability for the use of such *owned motor vehicle* by an *insured* as defined in the four subsections above.

Midget Automobile—means a land motor vehicle of the type commonly referred to as "midget automobile", "kart", "go-kart", "speedmobile" or by a comparable name, whether commercially built or otherwise.

Newly Acquired Automobile—means an *automobile*, ownership of which is acquired by the named insured or *spouse*, if

(1) it replaces an *automobile* owned by either and covered by this policy, or the company insures all *automobiles* owned by the named insured and such *spouse* on the date of its delivery, and

(2) PROVIDED THAT NO INSURANCE SHALL BE APPLICABLE TO SUCH *NEWLY ACQUIRED AUTOMOBILE* UNLESS AS A CONDITION PRECEDENT THE NAMED INSURED WITHIN 30 DAYS FOLLOWING SUCH DELIVERY DATE APPLIES TO THE COMPANY FOR INSURANCE ON SUCH *NEWLY ACQUIRED AUTOMOBILE*.

If more than one policy issued by the company could be applied to such *automobile* the named insured shall elect which policy shall apply. The named insured shall pay any additional premium required because of the application of the insurance to such *newly acquired automobile*.

Non-Owned Automobile—means an *automobile, trailer* or detachable living quarters unit, other than *a temporary substitute automobile*, not

(1) owned by,

(2) registered in the name of, or

(3) furnished or available for the frequent or regular use of

the named insured, *spouse* or any *relative*.

Occupying—means in or upon or entering into or alighting from.

Owned Motor Vehicle—means the motor vehicle or trailer described in the declarations, and includes a *temporary substitute automobile*, a *newly acquired automobile*, and, provided the described motor vehicle is not classified as "commercial", under coverages A and B, a *trailer* (as defined herein) or a detachable living quarters unit owned by the named insured or *spouse*.

Person—means a natural person and not a corporation, partnership, association or business name.

Private Passenger Automobile—means an *automobile* of the private passenger type designed solely for the transportation of *persons* and their personal luggage, and includes station wagons.

Property Damage—means injury to or destruction of property of others, including loss of use thereof.

Relative—means a *person* related to the named insured or *spouse* by blood, marriage or adoption who is a *resident* of the same household.

Resident or Reside—when used with reference to the named insured's household, means bodily presence in such household and an intention to continue to dwell therein. However, the named insured's unmarried and unemancipated children, while away from his or her household attending school, are deemed to be residents of such household.

Spouse—means a named insured's husband or wife, if a *resident* of the same household.

State—includes the District of Columbia, a territory or possession of the United States and a province or territory of Canada.

Temporary Substitute Automobile—means an *automobile* not owned by the named insured or *spouse* while temporarily used with the permission of the owner as a substitute for the described motor vehicle when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction.

Trailer—means a trailer or semitrailer not so described if designed for use with a *private passenger automobile* and if not

(1) a passenger trailer,

(2) a trailer used for business purposes with other than a *private passenger automobile*, or

(3) a trailer used as premises for office, store or display purposes.

Utility Automobile—means an *automobile* of the pick-up, panel or van body type with a load capacity of 2,000 pounds or less.

War—means war, whether or not declared, civil war, insurrection, rebellion or revolution, or any act or condition incident thereto.

SECTION II—PERSONAL INJURY PROTECTION COVERAGE

INSURING AGREEMENTS

COVERAGE P—PERSONAL INJURY PROTECTION

INSURING AGREEMENT

To pay, in accordance with the Utah Automobile No-Fault Insurance Act, and all Acts amendatory or supplemental thereto, to each *eligible injured person* personal injury protection benefits consisting of:

(a) *medical benefits*,

(b) *disability benefits*,

(c) *funeral benefits*, and

(d) *survivor benefits*

with respect to *bodily injury*, caused by accident and arising out of the use of a *motor vehicle* as a *motor vehicle* provided that the amount of benefits due under this coverage shall be determined by agreement between the *eligible injured person*, or the legal representative of such *person*, and the company, or if they fail to agree, by arbitration.

EXCLUSIONS—SECTION II

THIS INSURANCE DOES NOT APPLY UNDER COVERAGE P:

(a) TO *BODILY INJURY* SUSTAINED BY ANY *PERSON* WHILE *OCCUPYING* OR THROUGH BEING STRUCK BY A *MOTOR VEHICLE* OWNED BY THE NAMED INSURED OR A *RELATIVE* WHICH IS NOT AN *INSURED MOTOR VEHICLE;*

(b) TO *BODILY INJURY* SUSTAINED BY ANY *PERSON* WHILE OPERATING THE *INSURED MOTOR VEHICLE* WITHOUT THE EXPRESS OR IMPLIED CONSENT OF THE NAMED INSURED OR *SPOUSE* OR WHILE SUCH *PERSON* IS NOT IN LAWFUL POSSESSION OF SUCH *INSURED MOTOR VEHICLE;*

(c) TO ANY INJURED *PERSON* IF SUCH *PERSON'S* CONDUCT CONTRIBUTED TO HIS OR HER INJURY UNDER ANY OF THE FOLLOWING CIRCUMSTANCES:

(1) CAUSING *BODILY INJURY* TO HIMSELF OR HERSELF INTENTIONALLY, OR

(2) WHILE COMMITTING A FELONY;

(d) TO *BODILY INJURY* SUSTAINED BY ANY *PERSON* OTHER THAN THE NAMED INSURED OR ANY *RELATIVE,* WHILE NOT *OCCUPYING* ANY *MOTOR VEHICLE,* IF THE ACCIDENT OCCURS OUTSIDE THE STATE OF UTAH.

LIMITS OF LIABILITY

Regardless of the number of *persons* injured, policies applicable, vehicles involved, or claims made, there shall be no duplication of personal injury protection benefits, and the aggregate maximum amount payable under this and all applicable policies with respect to *bodily injury* sustained by any one *eligible injured person* as a result of any one accident shall not exceed:

(a) for *medical benefits,* the amount shown under the applicable coverage designation in the schedule for each *person* who sustains *bodily injury* in any one accident;

(b) for *disability benefits,*

(i) 85% of any loss of *income* or the amount shown under the applicable coverage designation in the schedule per week, whichever is less, for not to exceed the number of weeks shown under the applicable coverage designation in the schedule, after the date of such accident, provided that if the disability resulting in such loss of *income* includes only a part of a week, the company shall not be liable for a greater proportion of such weekly limit than the number of days lost from work during the part week bears to the number of days in his or her full work week, and

(ii) for reimbursement for household services, the amount shown under the applicable coverage designation in the schedule per day for not to exceed the number of days shown under the applicable coverage designation in the schedule;

(c) for *funeral benefits,* the amount shown under the applicable coverage designation in the schedule; and

(d) for *survivor benefits,* the amount shown under the applicable coverage designation in the schedule;

provided that any amount payable under paragraphs (a), (b), (c) and (d) above shall be reduced by any benefits which such injured *person* is entitled to receive under any workmen's compensation law or any similar statutory plan, and any amounts which such *person* is entitled to receive from the United States or any of its agencies because of military enlistment, duty or service.

DEFINITIONS—SECTION II

The definitions of *Bodily Injury, Damages, Newly Acquired Automobile, Occupying, Person, Relative, Resident or Reside and Spouse* under Section I apply to Section II and under Section II:

Disability Benefits—means

(i) reimbursement for 85% of any loss of gross income and loss of earning capacity per *person* from continuous inability to work during a period commencing three days after the date of the injury and ending on the date such injured *person* is able to return to his or her usual occupation or dies, subject to a limit per injured *person* of not to exceed $150 per week for a period of 52 weeks. If such disability continues for in excess of two consecutive weeks after the date of injury, such three day waiting period shall not apply; and

(ii) in lieu of reimbursement for expenses which would have been reasonably incurred for services which, but for the injury, the injured *person* would have performed for his or her household and regardless of whether any of such expenses are actually incurred, an allowance of $12 per day commencing three days after the date of such injury and ending on the date such *person* is able to perform such services, or dies, but in no event in excess of 365 days after the date of such accident. If such disability continues for in excess of 14 consecutive days after the date of injury, such three day waiting period shall not apply.

Eligible Injured Person—means

(a) the named insured, *spouse,* or any *relative* of either if such *person* sustains *bodily injury*

(1) while *occupying* a *motor vehicle,* or

(2) while a *pedestrian,* as a result of physical contact with a *motor vehicle* or motorcycle; or

(b) any other *person* who sustains *bodily injury*

(1) while *occupying,* with the permission of the named insured, the *insured motor vehicle,* or

(2) w[illegible] a *pedestrian*, as a result of an accident involving the *insured motor vehicle*.

Funeral Benefits—means reimbursement for funeral, burial, or cremation expenses.

Income—means salary, wages, tips, commissions, professional fees and profits from an individually owned business or farm.

Insured Motor Vehicle—means the *motor vehicle* described in the declarations or a *newly acquired automobile* of which the named insured is the *owner* and with respect to which

(a) the bodily injury liability coverage of the policy applies, and

(b) coverage is required to be maintained under the Utah Automobile No-Fault Insurance Act.

Medical Benefits—means reimbursement for the reasonable value of all expenses for necessary medical, surgical, X-ray, dental, and rehabilitation services, including eyeglasses, hearing aids, prosthetic devices, ambulance, hospital and nursing services and expenses for any non-medical remedial care and treatment rendered in accordance with a recognized religious method of healing.

Motor Vehicle—means any vehicle of a kind required to be registered with the Department of Motor Vehicles under Title 41 of the Utah Code, except motorcycles. A *motor vehicle* does not include any vehicle owned by the United States or any state other than Utah, or any political subdivision of either or any of their agencies on which the security required by Section 5 of the Utah Automobile No-Fault Insurance Act is not maintained.

Owner—means a *person* who holds the legal title to a *motor vehicle* or in the event a *motor vehicle* is the subject of a security agreement or lease with option to purchase, with the debtor or lessee having the right to possession, then such debtor or lessee shall be deemed the owner.

Pedestrian—means a *person* who is not *occupying* or riding upon a *motor vehicle*, excluding, however, any *person occupying* or riding upon a motorcycle.

Survivor Benefits—means compensation on account of the death of a *person* who qualified for *medical benefits* or *disability benefits*, payable to his or her heirs.

SCHEDULE

The applicable set of limits per *eligible injured person* is indicated by the coverage designation shown in the declarations.

Coverage designation	P1	P2	P3	P4	P5
(a) *medical benefits*	$2000	$5000	$10,000	$25,000	$100,000
(b) *disability benefits*					
(i) loss of *income* per week	$150	$150	$150	$150	$150
number of weeks	52	52	52	52	52
(ii) household service rate per day	$12	$12	$12	$12	$12
number of days	365	365	365	365	365
(c) *funeral benefits*	$1000	$1000	$1000	$1000	$1000
(d) *survivor benefits*	$2000	$2000	$5000	$5000	$10,000

SECTION III - PHYSICAL DAMAGE COVERAGES INSURING AGREEMENTS

COVERAGE D—COMPREHENSIVE

(1) The Owned Motor Vehicle. To pay for *loss* to the *owned motor vehicle* EXCEPT *LOSS* CAUSED BY *COLLISION* but only for the amount of each such *loss* in excess of the deductible amount, if any, stated in the declarations as applicable thereto. The deductible amount shall not apply to *loss* caused by a fire or by a theft of the entire vehicle. Breakage of glass, or *loss* caused by missiles, falling objects, fire, theft, larceny, explosion, earthquake, windstorm, hail, water, flood, malicious mischief or vandalism, riot or civil commotion or colliding with birds or animals shall not be deemed to be *loss* caused by *collision*.

(2) Wearing Apparel and Luggage. To pay for *loss* caused by fire, lightning, flood, falling objects, explosion, earthquake, or theft PROVIDED THE ENTIRE VEHICLE IS STOLEN, to wearing apparel and luggage owned by the first *person* named in the declarations, his or her *spouse* and any *relative* of either, while such property is in or upon the *owned motor vehicle*.

(3) Additional Benefits. In addition to the limit of liability,

(a) the company, following a theft of the entire vehicle, also will reimburse the named insured for transportation expenses, not exceeding $10 per day, incurred during the period starting 48 hours after the report of theft to the

compar ...nd ending when the company offers settleme... ...or the theft, and

(b) the company will pay general average and salvage charges for which the insured becomes legally liable; because of the *owned motor vehicle* being transported.

COVERAGE F—EIGHTY PER CENT COLLISION

To pay 80% of the first $250 and 100% over that amount of *loss* to the *owned motor vehicle* caused by *collision*. If the *collision* is with another motor vehicle insured with this company 100% of the *loss* shall be payable.

COVERAGE G—DEDUCTIBLE COLLISION

To pay for *loss* to the *owned motor vehicle* caused by: *collision* but only for the amount of each such *loss* in excess of the deductible amount stated in the declarations as applicable hereto. If the deductible amount is $100 or less it shall not apply if the *collision* is with another motor vehicle insured with this company.

Collision—Wearing Apparel and Luggage

If coverage F or G is provided by this policy, the company also agrees to pay for *loss* caused by *collision* to wearing apparel and luggage owned by the first *person* named in the declarations, his or her *spouse* and any *relative* of either while such property is in or upon the *owned motor vehicle*, but only for the amount of each such *loss* in excess of the deductible amount stated in the declarations. In the event of *loss* to the *owned motor vehicle* and such property in the same accident, the deductible amount shall first be applied to the *owned motor vehicle*, but only one deductible amount shall be applied.

COVERAGE H—EMERGENCY ROAD SERVICE

To pay the reasonable expense incurred in connection with the *owned motor vehicle* because of:

(1) delivery of gasoline, oil, loaned battery, or change of tire, BUT NOT THE COST OF SUCH ITEMS;

(2) mechanical first aid not to exceed one hour at the place of disablement;

(3) towing to the nearest garage or service station where the necessary repairs can be made if the vehicle will not operate under its own power.

COVERAGE R—MOTOR VEHICLE RENTAL REIMBURSEMENT

In the event of a *loss* to the *owned motor vehicle*, the company will reimburse the named insured for the expense incurred by such insured for the rental of a substitute automobile from a car rental agency or garage, incurred during a period starting with

(1) the date and time of such *loss* if as a direct result of such *loss* such vehicle cannot be operated under its own power, or

(2) the vehicle is operable, the date and time such insured authorizes repairs to be made and delivers such vehicle to the garage for repairs;

and ending, regardless of the policy period,

(i) upon the date of the completion of repairs or replacement of the property lost or damaged, or

(ii) upon such earlier date as the company makes or tenders settlement for such *loss* or damage, or

(iii) at 12:01 A.M. on the thirtieth day after the date of the commencement of such period.

COVERAGE R1—AUTOMOBILE RENTAL AND TRAVEL EXPENSE REIMBURSEMENT

In the event of a *loss* to the *owned motor vehicle*, the company will reimburse the named insured:

A. Expense for Rental of a Substitute Automobile

For the expense of the rental of a substitute automobile from a car rental agency or garage, not to exceed $14 per day, incurred during a period starting with

(1) the date and time of such *loss* if as a direct result of such *loss* such vehicle cannot be operated under its own power, or

(2) if the vehicle is operable, the date and time such insured authorizes repairs to be made and delivers such vehicle to the garage for repairs,

and ending, regardless of the policy period,

(i) upon the date of the completion of repairs or replacement of the property, or

(ii) upon such earlier date as the company makes or tenders settlement for such *loss* or damage.

B. Comprehensive or Collision Deductible

For any deductible amount applicable to the comprehensive and collision coverages in effect on a substitute automobile rented from a car rental agency or garage, if the insured is legally liable for such deductible amount.

C. Travel Expense

If the *loss* to the *owned motor vehicle* occurs more than 50 miles away from the named insured's residence, for

(1) commercial transportation expense incurred by

(i) the named insured,

(ii) the *spouse*, and

(iii) any *relative*,

who was *occupying* such vehicle at the time of such *loss*, from the site of such *loss* to the named insured's residence or to the named insured's destination (at the option of the named insured).

(2) necessary extra expense incurred for meals and lodging by the named insured, *spouse*, and *relatives* during a period commencing on the date of such *loss* and

endin the date of arrival at the named insured's reside or destination or at the end of the fifth day following the date of such *loss*, whichever occurs first.

(3) necessary extra expense for meals, lodging, and commercial transportation incurred by the named insured or some other *person* designated by the named insured for the purpose of returning the repaired *owned motor vehicle* from where it was repaired to the named insured's residence or destination.

USE OF NON-OWNED AUTOMOBILES

If the named insured is a *person* or *persons* and if during the policy period such named insured owns an *automobile* covered by this policy and classified as "pleasure and business" such insurance as is afforded by this policy with respect to the *owned motor vehicle* under coverages D, F, G, H, R and R1 applies to *loss* to a *non-owned automobile* provided

(a) such vehicle is a *private passenger* or *utility automobile*, a *trailer* as defined herein or a detachable living quarters unit and

(b) such vehicle is being operated by or is in the possession or custody of the first *person* named in the declarations, his or her *spouse* or any *relative* of either;

PROVIDED SUCH OPERATION, OCCUPANCY OR CUSTODY IS WITH THE PERMISSION OF THE OWNER OR *PERSON* IN LAWFUL POSSESSION OF SUCH VEHICLE AND IS WITHIN THE SCOPE OF SUCH PERMISSION, AND THAT SUCH FIRST NAMED INSURED, *SPOUSE* OR *RELATIVE* IS LEGALLY LIABLE TO THE OWNER THEREOF FOR THE *LOSS* TO SUCH VEHICLE.

EXCLUSIONS—SECTION III

THIS INSURANCE DOES NOT APPLY UNDER:

(a) COVERAGES D, F, G, H, R AND R1, TO A *NON-OWNED AUTOMOBILE*

(1) WHILE MAINTAINED OR USED BY ANY *PERSON* WHILE SUCH *PERSON* IS EMPLOYED OR OTHERWISE ENGAGED IN AN *AUTOMOBILE BUSINESS* OF THE INSURED OR OF ANY OTHER *PERSON* OR ORGANIZATION, OR

(2) WHILE USED IN ANY OTHER BUSINESS OR OCCUPATION, except a *private passenger automobile* operated or occupied by the first *person* named in the declarations, his or her *spouse* or any *relative* of either;

(b) COVERAGES D, F, G, H, R AND R1 WHILE THE *OWNED MOTOR VEHICLE* IS RENTED OR LEASED TO OTHERS BY THE INSURED, USED AS A PUBLIC OR LIVERY CONVEYANCE, OR USED FOR CARRYING *PERSONS* FOR A CHARGE, but the transportation on a sh xpense basis in a *private passenger automobile* of frie s, neighbors, fellow employees or school children shall not be deemed carrying *persons* for a charge;

(c) COVERAGES D, F, G, H, R AND R1:

(1) TO *LOSS* DUE TO TAKING BY ANY GOVERNMENTAL AUTHORITY;

(2) TO *LOSS* DUE TO RADIOACTIVE CONTAMINATION;

(3) WHILE THE *OWNED MOTOR VEHICLE* IS SUBJECT TO ANY BAILMENT LEASE, CONDITIONAL SALE, PURCHASE AGREEMENT, MORTGAGE OR OTHER ENCUMBRANCE, NOT DECLARED IN THIS POLICY;

(4) TO *LOSS* DUE TO *WAR;*

(d) COVERAGES D, F, G, R AND R1:

(1) TO ANY *LOSS* TO THE *OWNED MOTOR VEHICLE* OR TO A *NON-OWNED AUTOMOBILE* WHICH IS DUE AND CONFINED TO WEAR AND TEAR, FREEZING, MECHANICAL OR ELECTRICAL BREAKDOWN OR FAILURE, unless such *loss* is the direct result of a theft, covered by this policy, of the entire motor vehicle;

(2) TO TIRES unless stolen, damaged by fire, malicious mischief or vandalism, or unless such *loss* be coincident with other *loss* covered by this policy;

(e) COVERAGES D, R AND R1 TO *LOSS* DUE TO CONVERSION, EMBEZZLEMENT OR SECRETION BY ANY *PERSON* IN POSSESSION OF THE *OWNED MOTOR VEHICLE* UNDER A BAILMENT LEASE, CONDITIONAL SALE, PURCHASE AGREEMENT, MORTGAGE OR OTHER ENCUMBRANCE;

(f) COVERAGES R AND R1 TO THE EXTENT THAT ANY REIMBURSEMENT FOR TRANSPORTATION EXPENSE IS PAID OR PAYABLE TO THE NAMED INSURED AS A RESULT OF THE THEFT OF A MOTOR VEHICLE INSURED BY THE COMPANY.

LIMITS OF LIABILITY

(1) Coverages D, F and G. The limit of the company's liability for *loss* shall not exceed the actual cash value of the property, or if the *loss* is of a part thereof the actual cash value of such part, at time of *loss*, nor what it would then cost to repair or replace such property with other of like kind and quality, less depreciation and deductible amount applicable. The limit of liability for *loss* to all wearing apparel and luggage of one or more *persons* shall not exceed $200 for each occurrence.

The limit of liability on a non-owned *trailer* or a non-owned detachable living quarters unit shall not exceed $500.

The company may at its option pay for the *loss* in money or may repair or replace the property or such part thereof as aforesaid, or may return any stolen property with payment for any resultant damage thereto at any time before the *loss* is paid or the property is so replaced, or may

take all or such ... for the property at the agreed value but there shall be ... abandonment to the company. The company may at ... its option settle any claim for *loss* either with the named insured or the owner of the property.

(2) Coverage R. In no event shall the company be liable for more than $10 per day.

(3) Coverage R1. The limit of the company's liability for reimbursement for all items of expense incurred by all *persons* under this coverage shall not exceed the total sum of $400 for any one occurrence.

DEFINITIONS—SECTION III

The definitions under Section I, except the definitions of *Bodily Injury, Damages, Insured* and *Owned Motor Vehicle* apply to Section III and under Section III:

Collision—means collision of a motor vehicle covered by this policy with another object or with a vehicle to which it is attached or upset of such motor vehicle.

Equipment—means such equipment as is usual and incidental to the use and operation of the motor vehicle as a vehicle, including a tape recorder or stereo tape player permanently installed by the manufacturer of the automobile and one tape. Equipment does not include a detachable living quarters unit, even though attached, if the acquisition of such unit has not been previously reported to the company and any required premium thereon paid.

Loss—wherever used with respect to coverages D, F, G, R and R1, means each direct and accidental loss of or damage to

(1) an *owned motor vehicle*, or

(2) its *equipment.*

Under coverages D, F and G, loss also includes direct and accidental damage to wearing apparel and luggage.

Owned Motor Vehicle—means the motor vehicle or trailer described in the declarations, and includes a *temporary substitute automobile* and a *newly acquired automobile.*

SECTION IV—UNINSURED MOTOR VEHICLE COVERAGE

INSURING AGREEMENTS

COVERAGE U—DAMAGES FOR BODILY INJURY CAUSED BY UNINSURED MOTOR VEHICLES

To pay all sums which the *insured* or the legal representative of such *insured* shall be legally entitled to recover as damages from the owner or operator of an *uninsured motor vehicle* because of *bodily injury* sustained by the *insured,* caused by accident and arising out of the ownership, maintenance or use of such *uninsured motor vehicle* provided, for the purposes of this coverage, determination as to whether the *insured* or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the *insured* or such representative and the company or, if they fail to agree, by arbitration.

No judgment against any *person* or organization alleged to be legally responsible for the *bodily injury* shall be conclusive, as between the *insured* and the company, of the issues of liability of such *person* or organization or of the amount of damages to which the *insured* is legally entitled unless such judgment is entered pursuant to an action prosecuted by the *insured* with the written consent of the company.

EXCLUSIONS—SECTION IV

THIS INSURANCE DOES NOT APPLY:

(a) TO *BODILY INJURY* TO AN *INSURED,* WITH RESPECT TO WHICH SUCH *INSURED,* THE LEGAL REPRESENTATIVE OF SUCH *INSURED* OR ANY *PERSON* ENTITLED TO PAYMENT UNDER THIS COVERAGE SHALL, WITHOUT WRITTEN CONSENT OF THE COMPANY, MAKE ANY SETTLEMENT WITH ANY *PERSON* OR ORGANIZATION WHO MAY BE LEGALLY LIABLE THEREFOR;

(b) TO *BODILY INJURY* TO AN *INSURED* WHILE *OCCUPYING* OR THROUGH BEING STRUCK BY A LAND MOTOR VEHICLE OWNED BY THE NAMED INSURED OR ANY *RESIDENT* OF THE SAME HOUSEHOLD, IF SUCH VEHICLE IS NOT AN *OWNED MOTOR VEHICLE;*

(c) SO AS TO INURE DIRECTLY OR INDIRECTLY TO THE BENEFIT OF

(1) ANY WORKMEN'S COMPENSATION OR DISABILITY BENEFITS CARRIER, OR

(2) ANY *PERSON* OR ORGANIZATION QUALIFYING AS A SELF-INSURER UNDER ANY WORKMEN'S COMPENSATION OR DISABILITY BENEFITS LAW OR ANY SIMILAR LAW, OR

(3) THE UNITED STATES OR ANY STATE OR POLITICAL SUBDIVISION THEREOF.

LIMITS OF LIABILITY

(a) The limit of liability stated in the declarations as applicable to "each *person*" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of *bodily injury* sustained by one *person* in any one accident, and subject to this provision, the limit of liability stated in the declarations as applicable to "each accident" is the total limit of the company's liability for all such damages for *bodily injury* sustained by two or more *persons* in any one accident.

(b) Any amount payable under this coverage because of *bodily injury* sustained in an accident by a *person* who is an *insured* under this coverage shall be reduced by:

0000236

(1) all sums on account of such *bodily injury* by or on behalf of

(i) the owner or operator of the *uninsured motor vehicle* and

(ii) any other *person* or organization jointly or severally liable together with such owner or operator for such *bodily injury* including all sums paid under coverage A;

(2) the amount paid and the present value of all amounts payable on account of such *bodily injury* under any workmen's compensation law, disability benefits law or any similar law;

(3) all sums paid or payable on account of such *bodily injury* under coverage P of a policy issued by this company.

(c) Any payment made hereunder to or for any *insured* shall be applied in reduction of the amount of damages which he or she may be entitled to recover from any *person* who is an *insured* under coverage A.

(d) The inclusion in this policy of more than one motor vehicle does not increase the limit of liability.

DEFINITIONS—SECTION IV

The definitions of *Automobile, Bodily Injury, Newly Acquired Automobile, Occupying, Owned Motor Vehicle, Person, Relative, Resident, Spouse* and *Temporary Substitute Automobile* under Section I apply to Section IV and under Section IV:

Hit-and-Run Motor Vehicle—means a land motor vehicle which causes *bodily injury* to an *insured* arising out of physical contact of such vehicle with the *insured* or with a vehicle which the *insured* is *occupying* at the time of the accident, provided:

(1) there cannot be ascertained the identity of either the operator or owner of such *hit-and-run motor vehicle;*

(2) the *insured* or someone on the *insured's* behalf shall have reported the accident within 24 hours to a police or judicial officer or to the Commissioner of Motor Vehicles, and shall have filed with the company within 30 days thereafter a statement under oath that the *insured* or the *insured's* legal representative has a cause or causes of action arising out of such accident for damages against a *person* or *persons* whose identity is unascertainable, and setting forth the facts in support thereof; and

(3) at the company's request, the *insured* or the *insured's* legal representative makes available for inspection the vehicle which the *insured* was *occupying* at the time of the accident.

Insured—The unqualified word "insured" means

(1) the first *person* named in the declarations, his or her *spouse* and any *relative* of either;

(2) another *person* while *occupying* an *insured motor vehicle;* and

(3) any *person*, with respect to damages such *person* is entitled to recover because of *bodily injury* to which this coverage applies sustained by an *insured* under (1) or (2) above.

Insured Motor Vehicle—means:

(1) an *owned motor vehicle* provided the use thereof is by such first named insured or *spouse* or any other *person* to whom such first named insured or *spouse* has given permission to use such vehicle if the use is within the scope of such permission, or

(2) an *automobile* not owned by the named insured or any *resident* of the same household, other than a *temporary substitute automobile,* while being operated by such first named insured or *spouse,*

but the term *insured motor vehicle* shall not include any motor vehicle while being used as a public or livery conveyance, or any motor vehicle while being used without the permission of the owner.

Uninsured Motor Vehicle— means:

(1) a land motor vehicle with respect to the ownership, maintenance or use of which there is in at least the amounts specified by the financial responsibility law of the state in which the described motor vehicle is principally garaged, no bodily injury liability bond or insurance policy applicable at the time of the accident with respect to any *person* or organization legally responsible for the use of such vehicle, or with respect to which there is a bodily injury liability bond or insurance policy applicable at the time of the accident but the company writing the same denies that there is any coverage thereunder or is or becomes insolvent; or

(2) a *hit-and-run motor vehicle* as defined;

but the term *uninsured motor vehicle* shall not include:

(i) a vehicle defined herein as an *insured motor vehicle;*

(ii) a land motor vehicle furnished for the regular use of the named insured or any *resident* of the same household;

(iii) a land motor vehicle which is owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law or any similar law;

(iv) a land motor vehicle which is owned by the United States of America, Canada, a state, a political subdivision of any such government or an agency of any of the foregoing;

(v) a land motor vehicle designed for use principally off public roads except while being used on public roads;

(vi) a land motor vehicle while located for use as premises.

SECTION V—AUTOMOBILE DEATH INDEMNITY, DISMEMBERMENT AND LOSS OF SIGHT COVERAGE

INSURING AGREEMENTS

COVERAGE S—DEATH INDEMNITY, DISMEMBERMENT AND LOSS OF SIGHT

Division 1—Death Indemnity. To pay the amount stated as applicable to the *insured* designated for such coverage in the declarations in event of the death of each *insured* which shall result directly and independently of all other causes from *bodily injury* caused by accident and sustained by the *insured* while *occupying* or through being struck by an *automobile*, provided the death shall occur within 90 days from the date of such accident.

Division 2—Dismemberment and Loss of Sight. To pay the highest amount stated as applicable in the Schedule, for *loss* as enumerated therein, in the event of *bodily injury* caused by accident and sustained by the *insured* while *occupying* or through being struck by an *automobile*, provided *loss* be sustained by the *insured* within 90 days from the date of such accident.

As respects any *insured*,

(1) any amount for which the company is obligated or has made payment under division 2 shall apply in reduction of any amount for which the company is obligated under division 1;

(2) payment of the amount stated in the declarations shall terminate all obligation of the company under divisions 1 and 2 of this coverage.

Limit of Liability—Division 2. The company's limit of liability shall not exceed the applicable amount as stated in the Schedule for each *insured* who sustains *bodily injury* in any one accident.

Schedule

For Loss of	If Amount under S in Declarations is	
	$5,000	$10,000
Hands; feet; sight of eyes; one hand and one foot; or one hand or one foot and sight of one eye	$5,000	$10,000
One hand or one foot; or sight of one eye	2,500	5,000
Thumb and index finger on one hand; or three fingers on one hand	1,500	3,000
Any two fingers on one hand	1,000	2,000

EXCLUSIONS—SECTION V

THIS INSURANCE DOES NOT APPLY TO:

(a) *BODILY INJURY* SUSTAINED IN THE COURSE OF HIS OR HER OCCUPATION BY ANY PERSON WHILE ENGAGED

(1) IN DUTIES INCIDENT TO THE OPERATION, LOADING OR UNLOADING OF, OR AS AN ASSISTANT ON, A PUBLIC OR LIVERY CONVEYANCE, *COMMERCIAL AUTOMOBILE*, AMBULANCE, FIRE TRUCK, POLICE CAR OR OTHER EMERGENCY VEHICLE, OR

(2) IN DUTIES INCIDENT TO THE REPAIR OR SERVICING OF *AUTOMOBILES*;

(b) *BODILY INJURY* OR TO *LOSS* CAUSED BY OR RESULTING FROM DISEASE, except pus forming infection which shall occur through *bodily injury* to which this insurance applies;

(c) *BODILY INJURY* DUE TO SUICIDE, SANE OR INSANE, OR TO ANY ATTEMPT THEREAT;

(d) *BODILY INJURY* DUE TO *WAR*;

(e) *BODILY INJURY* SUSTAINED WHILE *OCCUPYING*

(1) ANY VEHICLE BEING USED FOR RACING OR

(2) ANY MILITARY VEHICLE.

DEFINITIONS—SECTION V

The definitions of *Bodily Injury*, *Occupying*, *Private Passenger Automobile*, *Utility Automobile* and *War* under Section I apply to Section V and under Section V:

Automobile—means a land motor vehicle, trailer, or semitrailer not operated on rails or crawler-treads, but does not mean:

(1) a farm type tractor or other equipment designed for use principally off public roads, except while actually upon public roads, or

(2) a land motor vehicle or trailer while located for use as a residence or premises and not as a vehicle.

0000238

Commercial A obile—means any land motor vehicle while used in t... insured's business or occupation other than

(1) a *private passenger automobile,*

(2) a school bus or

(3) an owned *utility automobile* not used for wholesale or retail delivery.

Insured— is the person or persons designated under "PERSON. NSURED" in the declarations with a limit of liability indicated under the caption "AMOUNTS" applicable to such coverage or coverages.

Loss—means with regard to hands and feet, actual severance through or above wrist or ankle joints; with regard to eyes, entire and irrecoverable loss of sight; with regard to thumb and fingers, actual severance through or above *metacarpophalangeal* joints.

POLICY CONDITIONS

(The Policy Conditions Apply to All Coverages Unless Otherwise Noted)

1. Notice

(a) In the event of an accident or *loss* written notice containing particulars sufficient to identify the *insured* or *eligible injured person* and also reasonably obtainable information respecting the time, place and circumstances of the accident, and the names and addresses of injured *persons* and available witnesses, shall be given by or on behalf of the *insured* or each *eligible injured person,* to the company or any of its authorized agents as soon as practicable.

In the event of theft, larceny, robbery or pilferage prompt notice shall also be given to the police.

(b) Coverages A and B. If claim is made or suit is brought against the *insured,* he or she shall immediately forward to the company every demand, notice, summons or other process received by him or her or his or her representative.

(c) Coverage P. If any *eligible injured person,* his or her legal representative or dependent survivors shall institute *legal action to recover damages for bodily injury against a person* or organization who is or may be liable in tort therefor, a copy of the summons and complaint or other process served in connection with such legal action shall be forwarded immediately to the company by such *person.*

(d) Coverage U. If before the company makes payment of loss under coverage U, the *Insured* or the legal representative of such *insured* shall institute any legal action for *bodily injury* against any *person* or organization legally responsible for the use of a motor vehicle involved in the accident, a copy of the summons and complaint or other process served in connection with such legal action shall be forwarded immediately to the company by the *insured* or the legal representative of such *insured.*

2. Action Against Company. No action shall lie against the company:

(a) Unless as a condition precedent thereto there shall have been full compliance with all terms of this policy.

(b) Under coverages A and B, until the amount of the *insured's* obligation to pay shall have been finally determined either by judgment against the *insured* after actual trial and affirmed on appeal, if an appeal has been taken from said judgment, or by written agreement of the *insured,* the claimant and the company.

Any *person* or organization, or the legal representative thereof, having secured such judgment or agreement, shall be entitled to recover under this policy to the extent of the insurance afforded. Nothing contained in this policy shall give any *person* or organization any right to join the company as a co-defendant in any action against the *insured* to determine the *insured's* liability.

Bankruptcy or insolvency of the *insured* or the *insured's* estate shall not relieve the company of its obligations.

(c) Under coverages D, F, G, H, R, R1, S and U until 30 days after the required notice of accident or *loss* has been filed with the company.

(d) Under coverage P until 35 days after the required notice of accident or loss has been filed with the company.

3. Assistance and Cooperation of the Insured. The *insured* shall cooperate with the company and, upon its request, attend hearings and trials, assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of any legal proceedings in connection with the subject matter of this insurance. The *insured* shall not, except at the *insured's* own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such first aid to others as *shall be imperative at the time of accident.*

4. Subrogation. Upon payment under this policy, except under coverages P and S, the company shall be subrogated to all the insured's rights of recovery therefor and the insured shall do whatever is necessary to secure such rights and do nothing to prejudice them.

5. Trust Agreement—Coverages P and U. In the event of payment to any *person* under coverage P or U:

(a) the company shall be entitled to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery of such *person* against any *person* or organization legally responsible for the *bodily injury* because of which such payment is made;

(b) such *person* shall hold in trust for the benefit of the company all rights of recovery which he or she shall have against such other *person* or organization because of the damages which are the subject of claim made under the coverages;

(c) such *person* shall do whatever is proper to secure and shall do nothing after loss to prejudice such rights;

(d) if requested in writing by the company, such *person* shall take, through any representative designated by the

company such action as may be necessary or appropriate to recover such payment as damages from such other *person* or organization, such action to be taken in the name of such *person;* in the event of a recovery, the company shall be reimbursed out of such recovery for expenses, costs and attorney's fees incurred by it in connection therewith;

(e) such *person* shall execute and deliver to the company *such instruments and papers as may be appropriate to* secure the rights and obligations of such *person* and the company established by this provision.

Any payment made under coverage P to or for any injured *person* shall be applied in reduction of the amount of damages which he or she may be entitled to recover from the company for the same accident under either coverage A or coverage U of this policy.

6. Medical Reports; Authorizations; Proof of Claim—Coverages P, S and U.

(a) Medical Reports. As soon as practicable the *person* making claim or someone on that *person's* behalf shall give to the company written proof of claim, including full particulars of the nature and extent of the injuries and treatment received and contemplated and other information as may assist the company in determining the amount payable. The injured *person* shall submit to physical or mental examinations by physicians selected by the company and at the company's expense when and as often as the company may reasonably require and upon each request by the company execute authorization to enable the company to obtain medical reports and copies of records. In the event of the injured *person's* incapacity or death, the legal representative of such *person* shall execute authorization for such reports and records. A copy of the medical report will be sent the injured *person* upon written request.

(b) Loss of Wages—Coverage P. If benefits for loss of wages or salary (or in the case of the self-employed, their equivalent) are claimed, the *person* presenting such claim shall authorize the company to obtain details of all wage or salary payments, or their equivalent, paid to such *person* by any employer or earned by such *person* since the time of the *bodily injury* and during the year immediately preceding the date of the accident.

(c) Proof of Claim. Proof of claim shall be made upon forms furnished by the company unless the company shall have failed to furnish such forms within 15 days after receiving notice of claim.

(d) Coverage U. The *insured* and every other *person* making claim shall submit to questioning under oath by any *person* named by the company and subscribe the same, as often as may reasonably be required.

7. Payment of Claim—Coverages P, S and U.

(a) Any amount due is payable

(i) under coverage P to the *eligible injured person,* and under coverages S and U to the *insured*, or

(ii) if the *eligible injured person* or *insured* is a minor or an incompetent *person,* to a parent or guardian, or

(iii) if the *eligible injured person* or *insured* be deceased, to the surviving *spouse*

provided the company may, at its option, pay any such amount due to a *person* or organization authorized by law to receive such payment.

(b) Coverage P. Payments under coverage P shall be made periodically on a monthly basis as expenses are incurred, after valid proof of loss has been submitted to the company. If such written proof is not furnished to the company as to the entire claim, any partial amount shall be paid within 35 days after such written proof is furnished to the company. Any part or all of the remainder of the claim that is subsequently supported by written proof shall be paid within 35 days after such written proof is furnished to the company, provided that any payment shall not be due where the company has reasonable proof to establish that it is not responsible for the payment, notwithstanding that written proof has been furnished to the company.

(c) Coverage S. Any payment made under coverage S shall, to the extent thereof, constitute a complete discharge of the company's obligations hereunder and the company shall not be required to see to the application of the money so paid.

The company shall have the right and opportunity to make an autopsy where it is not forbidden by law.

8. Other Insurance. Under coverages A, B, D, F, G, R and R1 with respect to any liability or *loss* to which this and any other automobile insurance policy issued to the named insured by the company also applies, the total limit of the company's liability under all such policies shall not exceed the highest applicable limit of liability under any one such policy.

Subject to the above paragraph, if the *insured* has other insurance against liability or *loss* covered by this policy, the company under coverages A, B, D, F, G, R and R1, shall not be liable for a greater proportion of such liability or *loss* than the applicable limit of liability bears to the total applicable limit of liability of all insurance against such liability or *loss*.

All of the foregoing provisions and all coverages are subject to the following:

(a) The insurance with respect to a *newly acquired automobile* SHALL NOT APPLY TO ANY LIABILITY OR *LOSS* AGAINST WHICH THE *INSURED* HAS OTHER INSURANCE APPLICABLE THERETO IN WHOLE OR IN PART.

(b) The insurance with respect to

(i) a *temporary substitute automobile,*

(ii) a *trailer,* or

(iii) a *non-owned automobile,*

shall be excess over other insurance; however, NO COVERAGE SHALL APPLY TO ANY LIABILITY OR *LOSS* IF THE VEHICLE IS OWNED BY ANY *PERSON*

OR ORGANIZATION ENGAGED IN THE *AUTOMOBILE BUSINESS* AND IF THE *INSURED* OR OWNER HAS OTHER INSURANCE APPLICABLE IN WHOLE OR IN PART TO SUCH LIABILITY OR *LOSS*.

(c) The insurance with respect to wearing apparel and luggage under coverages D, F and G shall be excess over other insurance.

Under coverage P no *person* may recover benefits afforded under this coverage from more than one policy or company on a duplicate basis. If benefits are available to any *person* *occupying* or through being struck by the *insured motor vehicle* and benefits are also available to such *person* as a named insured or as a *relative* of a named insured under another policy providing similar benefits, the policy providing coverage on the *insured motor vehicle* shall be primary and the policy available to such *person* as a named insured or as a *relative* of a named insured SHALL NOT APPLY.

Subject to the preceding paragraph, if two or more insurers are liable to pay benefits under coverage P or any similar coverage, the maximum amount payable under such coverage shall not exceed the amount payable under one policy. In the event that the company has paid more than its proportionate share of such benefits, it shall be entitled to recover the excess from each of the other insurers providing similar benefits.

Under coverage U with respect to *bodily injury* to an *insured* while *occupying* a motor vehicle not owned by a named insured under this coverage, the insurance hereunder shall apply only as excess insurance over any other similar insurance available to such occupant, and this insurance shall then apply only in the amount by which the applicable limit of liability of this coverage exceeds the sum of the applicable limits of liability of all such other insurance.

Subject to the foregoing paragraph, under coverage U if the *insured* has other similar insurance available to him or her against a loss covered by this coverage, then the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable under this coverage for a greater proportion of the applicable limit of liability of this coverage than such limit bears to the sum of the applicable limits of liability of this insurance and such other insurance.

Under coverage U, any insurance provided thereunder shall be excess insurance over any benefits available, or which would be available but for the application of a deductible, under the Utah Automobile No-Fault Insurance Act.

9. Arbitration. If any *person* making claim under coverage U and the company do not agree that such *person* is legally entitled to recover damages from the owner or operator of an *uninsured motor vehicle* because of *bodily injury* to the *insured* or do not agree as to the amount payable hereunder, or if any *person* and the company do not agree as to the amount, if any, payable under coverage P, then each party shall, upon written demand of either, select a competent and disinterested arbitrator. The two arbitrators so named shall select a third arbitrator, or if unable to agree thereon within 30 days, then upon request of such *person* making claim or the company such third arbitrator shall be selected by a judge of a court of record in the county and *state* in which such arbitration is pending. The arbitrators shall then hear and determine the question or questions so in dispute, and the decision in writing of any two arbitrators, shall be binding upon such *person* making claim and the company, each of whom shall pay his or her or its chosen arbitrator and shall bear equally the expense of the third arbitrator and all other expenses of the arbitration, provided that attorney fees and fees paid to medical or other expert witnesses are not deemed to be expenses of arbitration but are to be borne by the party incurring them. Unless the parties otherwise agree, the arbitration shall be conducted in the county and *state* in which such *person* making claim *resides* and in accordance with the usual rules governing procedure and admission of evidence in courts of law.

10. Named Insured's Duties When Loss Occurs—Coverages D, F, G, H, R and R1. When *loss* occurs, the named insured also shall:

(a) use every reasonable means to protect the damaged property covered by this policy from any further damage; reasonable expense incurred in affording such protection shall be deemed incurred at the company's request;

(b) upon the company's request, exhibit the damaged property to the company and submit to examinations under oath by anyone designated by the company, subscribe the same, procure and produce for the company's examination all pertinent records, receipts and invoices, or certified copies, if originals be lost, permitting copies thereof to be made, all at such reasonable times and places as the company shall designate.

11. No Benefit to Bailee. Insurance under coverages D, F, G, R and R1 shall not inure to the benefit of any carrier or other bailee for hire liable for *loss* to the *owned motor vehicle* or a *non-owned automobile*.

12. Joint and Several Interests. If two or more insureds are named in the declarations, each insured appoints the other insured or other insureds, jointly and severally, as his or her attorney in fact for purposes of cancellation, termination, modification or changes of the coverages, or any other provisions of this policy, said appointment to remain valid and in full force and effect until 20 days after receipt by the company of written notification from the insured of the termination of such appointment. The inclusion of more than one insured shall not operate to increase the limits of the company's liability.

13. Two or More Motor Vehicles—Sections I, II, III and IV. When two or more motor vehicles are insured hereunder, the policy shall apply separately to each but a motor vehicle and a *trailer* or *trailers* attached thereto shall be one motor vehicle as respects the limits of liability under coverages A, B, P and U.

14. Changes. Terms of this policy may not be waived or changed except by policy endorsement attached hereto, signed by an executive officer of the company.

15. Assignment. No interest in this policy is assignable unless the company's consent is endorsed hereon. If the named insured dies, this policy shall cover as named insured

(a) the surviving *spouse*,

(b) under Sections I, II, III and IV any *person* having proper temporary custody of the *owned motor vehicle* until the appointment and qualification of a legal representative, and thereafter the legal representative, but only while acting within the scope of his or her duties as such,

(c) under Section V, any *person* who, but for such death; would have continued to be an *insured*.

Consent of the beneficiary under division 1 of coverage S is not a requisite to cancellation, assignment, change of beneficiary or any other change in the policy.

16. Cancellation. The named insured may cancel this policy by mailing to the company written notice stating when thereafter such cancellation shall be effective.

The company may cancel this policy in accordance with the terms hereof by written notice, addressed to the named insured and mailed to his or her address last known to the company or its authorized agent stating when cancellation shall be effective. Such notice of cancellation shall be sufficient notwithstanding the death of the named insured.

The mailing of the notice shall be sufficient proof of notice and the effective date and hour of cancellation stated therein shall become the end of the policy period. Delivery of written notice shall be equivalent to mailing.

Unless, within 59 days of the effective date of this policy, the company mails or delivers a notice of cancellation to the named insured in the manner provided in the two preceding paragraphs, the company agrees as to each coverage in force on such effective date:

A. to continue such coverage in force until the expiration of the current policy period, and

B. to renew this policy for the succeeding policy period, unless the company advises the named insured of its intention not to renew this policy by notice sent to such insured not less than 30 days before the expiration of the current policy period, in the same manner as is provided herein for notices of cancellation by the company. Such renewal shall be at the rates legally in effect at the time thereof.

These agreements shall be void and of no effect:

1. If the named insured fails to discharge when due any of his or her obligations in connection with the payment of premium for this policy or any installment thereof whether payable directly or under any premium finance plan; or

2. If the named insured or any other operator who customarily operates a motor vehicle insured under the policy has his or her driver's license under suspension or revocation at any time:

(i) during the policy period; or

(ii) if the policy is renewed, during the current policy period or the 180 days immediately preceding its effective date.

In the event that the policy is canceled during the first 59 days following the effective date of the policy, the notice of cancellation shall be mailed to the named insured not less than 10 days prior to the effective date of such cancellation. After the policy has been in force for 59 days, subsequent notice of cancellation for non-payment shall be mailed to the named insured not less than 10 days prior to the effective date thereof. Notice of any other cancellation shall be mailed to the named insured not less than 20 days prior to the effective date thereof.

If the named insured cancels, earned premiums shall be computed in accordance with the company's short rate table and procedures. If the company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected or as soon as practicable thereafter, but the payment or tender of unearned premiums is not a condition of cancellation.

17. Liberalization Clause. If the company revises its policy form to grant broader coverage without additional charge, such insurance as is afforded hereunder shall be so extended or broadened effective upon adoption of such broader coverage by the company.

18. Declarations. By acceptance of this policy the named insured agrees that the statements in the declarations are his or her agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself or herself and the company or any of its agents relating to this insurance.

19. Motor Vehicle Compulsory Laws or Financial Responsibility Laws

A. Out-of-State Insurance—Coverages A, B and U.

If, under the provisions of the motor vehicle compulsory insurance law, motor vehicle financial responsibility law or any similar law of any *state*, an *insured* who is a non-resident of such *state* must maintain insurance with respect to the ownership, maintenance or use of an *owned motor vehicle* or a *non-owned automobile* in such *state* and the requirements of such insurance are greater than the insurance provided by this policy, any Bodily Injury and Property Damage Liability, Medical Payments and Uninsured Motor Vehicle insurance afforded under this policy shall be deemed to comply with such requirements. Insurance so provided shall be in lieu of the insurance otherwise provided by the policy, but only to the extent required by such law and only with respect to the ownership, maintenance or use of the *owned motor vehicle* or a *non-owned automobile* in such *state*. The insurance under this provision shall be reduced to the extent there is other collectible insurance under this or any other motor vehicle liability insurance policy. In no event shall any *person* be entitled to duplicate payments for the same elements of loss.

0000242

B. Financial Responsibility Laws—Coverages A and B.
When certified as proof of future financial responsibility under any motor vehicle financial responsibility law and while such proof is required during the policy period, this policy shall comply with such law to the extent of the coverage and limits required. The *insured* agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

20. Policy Period, Territory. Under Sections I, II, III and IV this insurance applies only to *loss* to a motor vehicle insured hereunder, other insured property and accidents which occur during the policy period in the United States of America, its territories or possessions, or Canada, or while such vehicle is being transported between ports thereof, provided the described motor vehicle is owned, maintained and used for the purposes stated in the declarations.

This insurance also applies under Sections I, II and III to such accidents and *loss* in Mexico within 50 miles of the United S. .s boundary. *Loss* in Mexico under Section III shall be determined upon the basis of cost at the nearest United States point.

Under Section V this insurance applies to accidents during the policy period which occur anywhere.

21. Provisional Premium. It is agreed that in the event of any change in the rules, rates, rating plan, premiums or minimum premiums applicable to the insurance afforded, because of an adverse judicial finding as to the constitutionality of any provisions of the Utah Automobile No-Fault Insurance Act providing for the exemption of persons from tort liability, the premium stated in the declarations for any automobile bodily injury, automobile property damage liability, automobile medical payments and protection against uninsured motorists insurance shall be deemed provisional and subject to recomputation.

If the final premium thus recomputed exceeds the premium stated in the declarations, the named insured shall pay to the company the excess as well as the amount of any return premium previously credited or refunded.

MUTUAL CONDITIONS

1. Membership. The membership fees set out in this policy, which are in addition to the premiums, are not returnable but entitle the first insured named in the declarations to insure one vehicle for any applicable coverage, and to insurance for any other coverage for which said fees were paid so long as this company continues to write such coverages and such insured remains a risk desirable to the company.

While this policy is in force, the first insured named in the declarations is entitled to vote at all meetings of members and to share in the earnings and savings of the company in accordance with the dividends declared by the Board of Directors on this and like policies.

2. No Contingent Liability. This policy is non-assessable.

3. Annual Meeting. The annual meeting of the members of the company shall be held at its home office at Bloomington, Illinois, on the second Monday of June at the hour of 10:00 A.M., unless the Board of Directors shall elect to change the time and place of such meeting, in which case, but not otherwise, due notice shall be mailed each member at the address disclosed in this policy at least 10 days prior thereto.

In Witness Whereof, the State Farm Mutual Automobile Insurance Company has caused this policy to be signed by its President and Secretary at Bloomington, Illinois, and countersigned on the declarations page by a duly authorized representative of the Company.

SECRETARY

PRESIDENT

6328L AMENDATORY ENDORSEME.

Nothing herein contained shall be held to alter, vary, waive or extend any of the terms, conditions, agreements or limitations of the undermentioned policy other than as stated below.

Effective _____ 12:01 A.M. Standard Time. Attached to and forming a part of

policy number _____

issued to _____

by the STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, of Bloomington, Illinois, or the STATE FARM FIRE AND CASUALTY COMPANY, of Bloomington, Illinois, as indicated by the company name on the policy of which this endorsement is a part.

(The information above is required only when this endorsement is issued subsequent to the preparation of the policy.)

Countersigned _____ , 19 ____

By _____
Authorized Representative

In consideration of the premium at which the policy is written, it is agreed that the "Limits of Liability" provision of Section II – Personal Injury Protection Coverage, is deleted and replaced by the following:

LIMITS OF LIABILITY

Regardless of the number of *persons* injured, policies applicable, vehicles involved, or claims made, there shall be no duplication of personal injury protection benefits, and the aggregate maximum amount payable under this and all applicable policies with respect to *bodily injury* sustained by any one *eligible injured person* as a result of any one accident shall not exceed:

(a) for *medical benefits*, the amount shown under the applicable coverage designation in the schedule for each *person* who sustains *bodily injury* in any one accident; provided, the amount payable for expenses incurred for services furnished more than three years after the date of the accident is limited to a maximum of $2000 less any amount paid or payable for services furnished during the first three years after the date of the accident.

(b) for *disability benefits*,

(i) 85% of any loss of *income* or the amount shown under the applicable coverage designation in the schedule per week, whichever is less, for not to exceed the number of weeks shown under the applicable coverage designation in the schedule, after the date of such accident, provided that if the disability resulting in such loss of *income* includes only a part of a week, the company shall not be liable for a greater proportion of such weekly limit than the number of days lost from work during the part week bears to the number of days in his or her full work week, and

(ii) for *reimbursement* for household services, the amount shown under the applicable coverage designation in the schedule per day for not to exceed the number of days shown under the applicable coverage designation in the schedule;

(c) for *funeral benefits*, the amount shown under the applicable coverage designation in the schedule; and

(d) for *survivor benefits*, the amount shown under the applicable coverage designation in the schedule; provided, if the death occurs more than three years after the date of the accident, the maximum amount payable is $2000.

provided that any amount payable under paragraphs (a), (b), (c) and (d) above shall be reduced by any benefits which such injured *person* is entitled to receive under any workmen's compensation law or any similar statutory plan, and any amounts which such *person* is entitled to receive from the United States or any of its agencies because of military enlistment, duty or service.

President

6328L

G256G CB RADIO, TAPE RECORDER AND TAPE PLAYER THEFT EXCLUSION

Nothing herein contained shall be held to alter, vary, waive or extend any of the terms, conditions, agreements or limitations of the undermentioned policy other than as stated below.

Effective _____ 12:01 A.M. Standard Time. Attached to and forming a part of policy number _____

issued to _____

by the STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, of Bloomington, Illinois, or the STATE FARM FIRE AND CASUALTY COMPANY, of Bloomington, Illinois, as indicated by the company name on the policy of which this endorsement is a part.

(The information above is required only when this endorsement is issued subsequent to the preparation of the policy.)

Countersigned _____, 19____

By _____
Authorized Representative

In consideration of the premium charged, it is agreed that the definition of *equipment* is amended to read:

Equipment — means such equipment as is usual and incidental to the use and operation of the motor vehicle as a vehicle. It does not include a detachable living quarters unit, even though attached, if the acquisition of such unit has not been previously reported to the company and any required premium thereon paid.

It is further agreed that the following exclusions are added:

1. THIS INSURANCE DOES NOT APPLY UNDER THE PHYSICAL DAMAGE SECTION TO *LOSS* OF ANY RECORDING TAPE.
2. THIS INSURANCE DOES NOT APPLY TO *LOSS* BY THEFT OF:

   (a) A CITIZENS BAND RADIO, TAPE RECORDER OR TAPE PLAYER, OR

   (b) ANY ELECTRONIC DEVICE INCORPORATING ANY OF THE FOREGOING,

   unless permanently installed in the opening of the dash or console of the *owned motor vehicle* normally used by the motor vehicle manufacturer for the installation of a radio.

Edward B. Rust
President

625GG

Glenn C. Hanni, A1327
R. Scott Williams, 3498
STRONG & HANNI
Attorneys for Defendant &
Third-Party Plaintiff
Sixth Floor Boston Building
Salt Lake City, Utah 84111
Telephone: (801) 532-7080

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ROBERT KENT HILL, et al., Plaintiffs,	:	
vs.	:	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant and Third-Party Plaintiff,	:	AFFIDAVIT
	:	Civil No. C83-8099
vs.	:	
KENNETH PAUL BRYAN, Third-Party Defendant.	:	Judge Judith M. Billings

I, Grant M. Cutler, do hereby state as follows:

1. I am the claim superientendent for State Farm Mutual Automobile Insurance Company in Salt Lake City.

2. I am personally familiar with payments made by State Farm under the No-Fault insurance policy provisions of State Farm's policy with Lorin Dean Caldwell arising out of an automobile accident which occurred on or about June 6,

EXHIBIT B

1982, resulting in the deaths of Troy Caldwell and Tamara Hill.

3. No-Fault insurance benefits were paid by State Farm to or for the parents of Troy Caldwell in the amount of $6,539.00 and to or for the parents of Tamara Hill in the amount of $6,123.00.

4. I am personally familiar with the basic provisions of the insurance policy of Mr. Caldwell with State Farm. The policy included a condition entitled Subrogation, a copy of which condition is attached to this affidavit.

Dated this ____ day of September, 1984.

_____
Grant M. Cutler

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Subscribed and sworn to before me this ____ day of September, 1984.

_____
Notary Public - Residing at:

_____

My Commission Expires:

_____

Tab I

WALLACE R. LAUCHNOR (1905)
Moffat, Paulsen, Lauchnor & Young
Suite 300
261 East Broadway
Salt Lake City, UT 84111
Telephone: (801) 521-7500

ROY A. JACOBSON, JR. (4480)
V. ANTHONY VEHAR
~~VEHAR, BEPPLER, JACOBSON, LAVERY & ROSE,~~ P.C.
P.O. Box 189
Kemmerer, WY 83101
Telephone: (307) 877-3973

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

ROBERT KENT HILL, individually, and as personal representative of the heirs of TAMARA ELAINE HILL, deceased, and LORIN DEAN CALDWELL, individually and as personal representative of the heirs of TROY NEIL CALDWELL, deceased, Plaintiffs, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant.	Civil No. C83-8099 PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COME NOW, the Plaintiffs, by and through their counsel, and respectfully submit the following memorandum in opposition to Defendant's Motion for Summary Judgment.

Defendant's motion for summary judgment should not be granted because:

1. As to Plaintiff Hill there is a question of material fact in that Plaintiff Hill was in privity of contract with the Defendant as to the Defendant's payment of, and attempts to recover, P.I.P. payments made to Plaintiff Hill.

2. As to Defendant's motion for summary judgment on the issue of punitive damages, the law is not clear, and Plaintiffs have moved for an order of this Court allowing them to amend their Complaint to set forth with more particularity the independent tort of interference with economic relations.

I. PLAINTIFFS' STATEMENT OF MATERIAL FACTS

Plaintiffs agree with the material facts set forth by Defendant at paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, and all of 11 but the last sentence, and in addition thereto rely on the following unrefuted material facts.

1. The State Farm insurance policy included a provision for the recovery of Personal Injury Protection - no fault benefits at paragraph '5' of the policy conditions, which states, in pertinent part:

> 5. Trust Agreement-Coverages P [Personal Injury Protection (P.I.P.)] and U. In the event of payment to any person under coverage P or U:
>
> (a) The company shall be entitled to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery of such person against any person or

0000260

> organization legally responsible for the bodily injury because of which such payment is made;
>
> (b) such person shall hold in trust for the benefit of the company all rights of recovery which he or she shall have against such other person or organization because of the damages which are the subject of claim made under the coverages;
>
> ....

2. State Farm intended and attempted to have withheld from the CUMIS payment to Plaintiffs, the money paid for P.I.P. (Affidavit of Wallace Lauchnor).

3. It was necessary for Plaintiffs to hire an attorney to deal with State Farm relative to its claims for recovery of the P.I.P. monies and subrogation for the property damages. (Affidavit of Wallace Lauchnor).

4. Only upon intercession by Plaintiffs' attorney did State Farm determine not to further pursue recovery of the P.I.P. monies. (Affidavit of Wallace Lauchnor).

5. The CUMIS policy, with a single liability limit of $50,000.00, was not sufficient to satisfy Plaintiffs' wrongful death claims. (Affidavit of Wallace Lauchnor).

6. ~~Plaintiffs~~' attorney was told by the State Farm claims man for the Plaintiffs' claims, that if Plaintiffs wished to prove that the deaths of their children were worth $25,000.00 or more each, Plaintiffs would have to litigate the matter with the tort feasor and prove the children's worth to State Farm.

7. Plaintiffs' attorney made it clear to the State Farm claims man that the costs of litigating the worth of the two children would exceed the recovery claimed by State Farm.

8. Plaintiffs' attorney offered to let State Farm proceed with subrogation at State Farm's cost; State Farm refused.

9. The release signed by Plaintiff Hill and his wife recited consideration of $22,245.00 and specifically stated that:

> It is understood that the above amount of twenty two thousand two hundred and forty five and no/100 Dollars ($22,245.00) represents twenty five thousand and no/100 Dollars ($25,000.00) policy limits less the collision claim of five thousand five hundred ten and no/100 Dollars ($5,510.00) by State Farm Mutual Insurance Company, wherein a controversy exists as to who is entitled to the said amount, and that the matter will be resolved between the two or by payment into court or by judicial determination. (Hill Depo., Exhibit 1.)

10. No discovery has been conducted since the Utah Supreme Court rendered its opinion in Hill v. State Farm Mutual Automobile Insurance Company, 765 P2d 864 (Utah 1988); Defendants Motion for Summary Judgment relies on the same facts that the Supreme Court determined were insufficient to sustain summary judgment in Hill v. State Farm Mutual Automobile Insurance Company.

II. PLAINTIFF HILL WAS IN PRIVITY OF CONTRACT WITH STATE FARM

Plaintiffs complain of State Farm's actions in its attempts to enforce the subrogation and Trust Agreement provisions of the State Farm automobile policy. It is essential to recognize that

State Farm attempted to recover not only the monies it paid to Caldwell for property damage but also the monies it paid to Hill and Caldwell for P.I.P. It cannot be seriously argued but that State Farm was in privity of contract with Hill as to the recovery of P.I.P. monies under the "Trust Agreement" policy conditions. While State Farm asserts that it stepped into the shoes of Caldwell only in pursuing the subrogation claim for property damage, such contention is fatally flawed and must fail for the reality is State Farm's extortion was in violation of Utah's doctrine of "equitable subrogation" and it worked as a detriment to Hill in that he would receive less money from the settlement with CUMIS.

Although State Farm restricts Plaintiffs' complaints of bad faith to its refusal to waive its subrogation claim, such restriction is not accurate. Plaintiffs' foremost bad faith complaint with State Farm arises out of State Farm's total failure to investigate whether the paltry CUMIS insurance monies were sufficient to satisfy Plaintiffs' wrongful death claims.

Beck v. Farmers Ins. Exchange, 701 P.2d 795 (Utah 1985) concluded that:

> ... the obligation of good faith performance contemplates at the very least, that the insurer will diligently investigate the facts to enable it to determine whether a claim is valid, will fairly evaluate the claim, and will thereafter act promptly and reasonably in rejecting or settling the claim.
>
> The duty of good faith also requires the insurer ... to refrain from actions that will injure the insured's ability to obtain the benefits of the contract. (citations omitted) (emphasis added)

State Farm apparently did not investigate and without investigating State Farm was unable to determine, in good faith, (1) whether the CUMIS proceeds were sufficient to satisfy Plaintiffs' wrongful death claims, (2) whether State Farm's claim for subrogation was in fact valid under Utah law given the doctrine of "equitable subrogation", and (3) whether Plaintiffs' claim that State Farm was not entitled to subrogation or repayment of P.I.P. benefits was valid.

Plaintiffs assert that any reasonable investigation would show (a) that the $50,000.00 CUMIS policy was not sufficient to satisfy the Plaintiffs' wrongful death claims but in fact was wholly inadequate; (b) that Plaintiffs' attorneys had conducted investigations to determine the same matters; and (c) that Plaintiffs' attorneys had useful and valid information that State Farm could use in its investigation and in making its evaluations.

Instead, State Farm made its evaluations, rejected Plaintiffs' claims and upheld its own claims based on no reasonable investigation of facts necessary to make fair evaluations and decisions. State Farm's determinations appear to be that:

(1) Plaintiffs' wrongful death claims were satisfied by the CUMIS payment of $50,000.00; that is to say Plaintiffs were made whole for the wrongful death of two (2) outstanding children by the total payment of $50,000.00.

(2) Because Plaintiffs' claims were satisfied by the payment of $50,000.00, State Farm was entitled to satisfy its claim for subrogation as to the $5,500.00 paid to Caldwell for property damage and State Farm was entitled to reimbursement from Caldwell and Hill for P.I.P. payments in the sum of $12,622.00 under the trust agreement provisions of the Caldwell policy.

(3) Plaintiffs' claim that State Farm was not entitled to subrogation or repayment of P.I.P. benefits should be rejected.

(4) There was legal burden and duty upon grief-stricken and devastated parents to file a lawsuit, relive the worst days of their lives and take that suit to judgment to show State Farm that the wrongful deaths of two outstanding teenage children were worth more than $25,000.00 each.

(5) State Farm had no duty or burden to investigate whether its subrogation and trust agreement claims were good claims under Utah law given the unrefutable facts of this case.

(6) State Farm could enforce its claimed rights to subrogation and recovery of the P.I.P. monies as such actions would not injure the insured's ability to obtain the benefit of the insurance contract.

It has long been the law in this jurisdiction that summary judgment should be granted only when it is clear from the undisputed facts that the opposing party cannot prevail. Larson v. Wycoff, 624 P.2d 1151, 1153 (Utah 1981); Frisbee v. K & K Construction, 676 P.2d 387, 389 (Utah 1984). State Farm's

contentions, as the Utah Supreme Court pointed out in Hill v. State Farm Mutual Automobile Insurance Company, Supra at 868 decision, place the burden on State Farm to prove that its contentions were in fact accurate and in good faith. Clearly, there are material questions of fact with respect to those contentions for which State Farm has the burden of proof.

Defendant's motion for summary judgment as to Plaintiff Hill should be denied.

III. UTAH LAW AS TO PUNITIVE DAMAGES FOR FIRST PARTY BAD FAITH IS UNSETTLED

Defendant is correct in its evaluation of Beck v. Farmer's Insurance Exchange, 701 P2d 795 (Utah 1985) as not providing for punitive damages in the first party bad faith case. It is, however, not at all clear that the Utah Supreme Court is still of that opinion and it is clear that the Court of Appeals is not of that opinion.

In Gagon v. State Farm Mut. Auto. Ins. Co., 746 P.2d 1194 (Utah App. 1987), the Court of Appeals (per Judges Greenwood, Bench and Billings) reversed and remanded a district court directed verdict in a First Party bad faith action. As part of his appeal, Plaintiff Gagon claimed that the district court improperly excluded evidence of punitive damages and consequentual damages, including attorney's fees. The court found no error in the excusion in that the parties had stipulated, and the district court had agreed, to exclude evidence of punitive damages until the jury had found State Farm

had acted in bad faith. The court concluded its opinion with the statement that:

> If lack of good faith is found on remand, consideration of punitive damages and consequentual damages will be appropriate. Id. at 1197.

In Gagon v. State Farm Mutual Auto Ins. Co., 771 P.2d 325 (Utah 1988), State Farm's petition for certiorari was denied without opinion by the Supreme Court although Justice Zimmerman provided a concurring opinion, which opinion was quoted at length by Defendant in its brief. The concurring opinion is little more than a brief recitation of that part of the the Beck opinion which held that a plaintiff was not entitled to put on punitive damage evidence unless the plaintiff could make a sufficient case to go to the jury on an independent tort theory. What is, perhaps, more notable is the fact that a majority of the Court did not join in Justice Zimmerman's affirmance of that portion of Beck. Plaintiffs assert that based on the Gagon opinions, the Supreme Court will rule, in the appropriate case, that punitive damages are "appropriate" for "lack of good faith." As the law is not clear, Defendant's motion should be denied.

IV. PLAINTIFFS' ORIGINAL COMPLAINT SETS FORTH THE INDEPENDENT TORT OF INTERFERENCE WITH ECONOMIC RELATION

Plaintiffs' Complaint sets forth all the requisites of the tort claim for interference with economic relations. To state a claim for intentional interference with economic relations, the plaintiff must show:

> (1) That the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff. Leigh Furniture and Carpet Co. v. Isam, 657 P.2d 293, 304 (Utah 1982).

While Plaintiffs' original Complaint did not, however, specifically claim for relief based upon intentional interference with economic relations, the material allegations and elements of the tort claim were indeed included in the Complaint. Plaintiffs have filed concurrently herewith their motion for an order permitting them to amend their Complaint to clarify that the original allegations and elements are indeed an assertion of an independent tort.

Plaintiffs' claim punitive damages arising from the intentional interference alleging that Defendant's actions were malicious or were taken with wanton disregard for Plaintiffs' rights. Plaintiffs submit that the Court should not grant Defendant's motion for summary judgment as to punitive damages pending the Court's decision on Plaintiffs' motion to amend their Complaint, as well as further opportunity for discovery in this case.

V. STATE FARM'S MOTION FOR SUMMARY JUDGMENT IS PREMATURE; PLAINTIFFS SHOULD BE ALLOWED A REASONABLE TIME IN WHICH TO CONDUCT DISCOVERY

Although Plaintiffs filed this lawsuit some years ago, little time has been available for discovery. This matter was

originally filed on November 18, 1983. Defendant's first motion for summary judgment was filed on September 12, 1984, and was granted by the trial court on October 22, 1984. A lengthy appeal followed with final disposition on November 1, 1988. Following the decision on appeal, Plaintiffs unsuccessfully attempted settlement of this matter. On May 4, 1989, Defendant filed the present motions for summary judgment. At the same time, Mr. Lauchnor, Plaintiffs' original attorney in this matter, determined that he would most likely be a witness and would have to withdraw as counsel. Defendant has filed its latest motion for summary judgment based on the same facts found insufficient to support summary judgment the first time around.

Judicial economy and the interest of justice will be better served if Plaintiff's are allowed time to complete discovery. Concurrent with the filing of Plaintiffs' memorandum in opposition to State Farm's latest summary judgment motion, Plaintiffs have filed a motion to amend their Complaint, together with concise and thorough interrogatories and requests for production.

As Utah Courts have recognized, summary judgment should not be granted if discovery is incomplete since information sought in discovery may create genuine issues of material fact sufficient to defeat the motion. Averbach's, Inc. v. Kimball, 572 P2d 376, 377 (Utah 1977).

CONCLUSION

For the reasons set forth herein, Defendant's motion for ;ary judgment should be dismissed.

RESPECTFULLY SUBMITTED this 16th day of June, 1989.

WALLACE R. LAUCHNOR (1905)
Moffat, Paulsen, Lauchnor & Young
Suite 300
261 East Broadway
Salt Lake City, UT 84111
Telephone: (801) 521-7500

ROY A. JACOBSON, JR. (4480)
V. ANTHONY VEHAR
VEHAR, BEPPLER, JACOBSON, LAVERY
& ROSE, P.C.
P.O. Box 189
Kemmerer, WY 83101
Telephone: (307) 877-3973

Attorneys for Plaintiffs

Tab J

WALLACE R. LAUCHNOR (1905)
Moffat, Paulsen, Lauchnor & Young
Suite 300
261 East Broadway
Salt Lake City, UT 84111
Telephone: (801) 521-7500

ROY A. JACOBSON, JR. (4480)
V. ANTHONY VEHAR
VEHAR, BEPPLER, JACOBSON, LAVERY & ROSE, P.C.
P.O. Box 189
Kemmerer, WY 83101
Telephone: (307) 877-3973

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

ROBERT KENT HILL, individually, and as personal representative of the heirs of TAMARA ELAINE HILL, deceased, and LORIN DEAN CALDWELL, individually and as personal representative of the heirs of TROY NEIL CALDWELL, deceased, Plaintiffs, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant.	Civil No. C83-8099 AFFIDAVIT OF WALLACE R. LAUCHNOR

THE STATE OF UTAH)
) SS.
COUNTY OF _____)

1. Your affiant is an attorney at law, duly licensed to practice before all the Courts of this state, and is one of the attorneys for Plaintiffs.

2. On or about February 1, 1983 Lorin Dean Caldwell and Robert Kent and Janet Hill came to me to see if they could obtain some help, after Mr. Hill and Mr. Caldwell were informed by State Farm that they would not permit them to accept settlement of insurance monies from CUMIS without litigation unless State Farm's claim for subrogation was honored by a payment to State Farm for their collision loss. The State Farm adjuster or claims manager also wanted to withhold from the payment the money paid under PIP no fault.

3. I then contacted the claims manager for CUMIS to verify what I had been told concerning the subrogation demands of State Farm; he confirmed to me by telephone.

4. On several occasions I contacted State Farm's claims man and discussed the matter with him, bringing to his attention the fact that under the Utah case law he was not entitled to claim any subrogation on the PIP payments.

5. State Farm's claims man finally conceded that perhaps he was not entitled to subrogation for PIP, but that he would not relinquish any claim whatsoever for the collision loss.

6. I discussed with the State Farm claims man the fact that $25,000 per deceased child was certainly not an adequate award for their deaths by a drunken driver where the liability was absolutely clear.

7. I further explained to the State Farm claims man that the claims department of CUMIS had agreed that their policy was inadequate to satisfy the claims, and, therefore, they were ready, willing and able to deliver their policy limits as soon as the plaintiffs would accept the money, with the hope that State Farm would not make any further claim for subrogation so that litigation could be avoided.

8. I again contacted State Farm's claims man but was told that they would not relinquish their claim under any circumstance. He made it very clear to me that if we wished to prove that the deaths of the two high school students were worth $25,000 or more each, the Hills and Caldwells would have to litigate the matter with the tort feasor and prove to him that this be the case.

9. I made it very clear to the State Farm's claims man that the amount involved would not warrant either Mr. Hill or Mr.

Caldwell spending such money to hire counsel, as the attorney's fees and court costs would exceed the recovery being claimed by State Farm. I further pointed out that the insureds were going to end up spending more money to try to prove State Farm's claim of subrogation than the claim was worth, and that this simply was unjust.

10. I also then offered to let State Farm proceed with subrogation and pay their own counsel if they so desired but felt it was grossly unfair to expect the insured and Mr. Hill to foot the bill for this litigation where the money had already been offered by the tort feasor's carrier. He nevertheless refused to acquiesce in any of these suggestions.

11. No discovery has been conducted since the Utah Supreme Court rendered its opinion in Hill v. State Farm Mutual Automobile Insurance Company, 765 P2d 864 (Utah 1988).

DATED this 16 day of June, 1989.

Wallace R. Laughnor
WALLACE R. LAUGHNOR
Attorney for Plaintiffs

SUBSCRIBED AND SWORN to before me this 16 day of June, 1989.

WITNESS my hand and official seal.

NOTARY PUBLIC

My Commission Expires:

000027

Tab K

WALLACE R. LAUCHNOR (1905)
Moffat, Paulsen, Lauchnor & Young
Suite 300
261 East Broadway
Salt Lake City, UT 84111
Telephone: (801) 521-7500

ROY A. JACOBSON, JR. (4480)
V. ANTHONY VEHAR
VEHAR, BEPPLER, JACOBSON, LAVERY & ROSE, P.C.
P.O. Box 189
Kemmerer, WY 83101
Telephone: (307) 877-3973

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

ROBERT KENT HILL, individually, and as personal representative of the heirs of TAMARA ELAINE HILL, deceased, and LORIN DEAN CALDWELL, individually and as personal representative of the heirs of TROY NEIL CALDWELL, deceased, Plaintiffs, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant.	Civil No. C83-8099 MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORDS:

COME NOW, Plaintiffs, and request an Order of this Court, pursuant to Rule 15 of the Utah Rules of Civil Procedure

permitting said Plaintiffs, in the interest of justice, to amend their Complaint and to file their First Amended Complaint herein, a copy of which is attached hereto as Exhibit "A". Defendant further requests an expedited hearing date for oral argument on this Motion.

This Motion is brought pursuant to Rule 15, Utah Rules of Civil Procedure, the pleadings, files and records herein, and the Affidavit of Roy A. Jacobson, Jr., which is attached hereto.

DATED this 16th day of June, 1989.

ROBERT KENT HILL, et al.,
Plaintiffs

BY: _____
ROY A. JACOBSON, JR.
VEHAR, BEPPLER, JACOBSON,
LAVERY & ROSE, P.C.
Attorneys for Plaintiffs
P.O. Box 189
Kemmerer, WY 83101
Telephone: (307) 877-3973

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of June, 1989, I served the above and foregoing instrument upon Defendant by depositing a true and correct copy of the same in the United States mail, postage prepaid, addressed as follows:

Glenn C. Hanni, Esq.
R. Scott Williams, Esq.
Strong & Hanni
Sixth Floor Boston Building
Salt Lake City, UT 84111

_____

WALLACE R. LAUCHNOR (1905)
Moffat, Paulsen, Lauchnor & Young
Suite 300
261 East Broadway
Salt Lake City, UT 84111
Telephone: (801) 521-7500

ROY A. JACOBSON, JR. (4480)
V. ANTHONY VEHAR
VEHAR, BEPPLER, JACOBSON, LAVERY & ROSE, P.C.
P.O. Box 189
Kemmerer, WY 83101
Telephone: (307) 877-3973

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

ROBERT KENT HILL, individually, and as personal representative of the heirs of TAMARA ELAINE HILL, deceased, and LORIN DEAN CALDWELL, individually and as personal representative of the heirs of TROY NEIL CALDWELL, deceased, Plaintiffs, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant.	Civil No. C83-8099 FIRST AMENDED COMPLAINT

EXHIBIT "A"

COME NOW, Plaintiffs, by and through their undersigned attorneys, and for their cause against the Defendant allege as follows:

COMMON ALLEGATIONS

1. On or about the 6th day of June, 1982, Plaintiff, Lorin Dean Caldwell, had an insurance policy with the Defendant, insuring an automobile owned by Plaintiff, Lorin Dean Caldwell, and the insurance coverage provided by the Defendant on the automobile included, among other things, collision damage and PIP coverage.

2. Defendant is an insurance company licensed to do business within the State of Utah and the Plaintiffs are residents of the State of Utah.

3. On or about the 6th day of June, 1982, at or near the intersection of 3900 South Street, where the same intersects with 700 East Street, in Salt Lake County, State of Utah, a vehicle owned by Plaintiff, Lorin Dean Caldwell, and insured by the Defendant, was involved in an automobile accident with a vehicle being driven by Kenneth Paul Bryan, and insured by the CUMIS Insurance Society, Inc.

4. The collision was caused by the negligence and intoxication of Kenneth Paul Bryan.

5. As a direct and proximate result of the negligence and intoxication of Kenneth Paul Bryan, Troy Neil Caldwell, the driver of the vehicle insured by the Defendant, was killed by in collision; at the time of his death, Troy Neil Caldwell, was a minor under the age of eighteen (18) years.

6. As a further direct and proximate result of said collision, the Plaintiff, Robert Kent Hill, suffered the loss of his daughter, Tamara Elaine Hill, who was accidentally killed while riding in the automobile with the minor decedent, Caldwell, as a passenger at the time of the accident.

7. Neither the driver or the passenger of the Caldwell vehicle was negligent in any manner in causing the accident.

8. As a direct and proximate result of the accident the above-named Plaintiffs brought suit against Kenneth Paul Bryan and others for the wrongful death of the above-named minors.

9. As a proximate result of the accident, the automobile of Plaintiff, Lorin Dean Caldwell, was damaged in the sum of $5,510.00.

10. Kenneth Paul Bryan was driving an automobile insured by the CUMIS Insurance Society, Inc., with a single limit liability insurance coverage on the automobile in the amount of $50,000.00.

11. The wrongful deaths of the Plaintiffs' children far exceeded in value the sum of $25,000.00 per wrongful death, or a

total of $50,000 as insurance afforded by the single limit policy aforementioned.

12. As a direct and proximate result of the wrongful acts and omissions of Defendant herein, Plaintiffs have suffered the following damages:

(a) Great physical, mental, and emotional distress, anguish, pain and suffering;

(b) Necessary and reasonable attorney fees in excess of the sum of $25,000.00; and

(c) Plaintiff Hill incurred substantial disability and lost earning capacity as a result of the loss of his daughter which disability was aggravated by Defendant's actions, to the damage of Plaintiff Hill;

(d) Defendant's wrongful conduct impaired Plaintiff Hill's ability to mitigate and avert the loss of the family home and proximately resulted in the forced sale of the family home at a substantial economic loss to his family.

COUNT I - BAD FAITH

13. Plaintiffs reallege and incorporate by reference herein, the allegations contained in paragraphs 1 through 12 above, and further allege as follows:

14. Plaintiffs arrived at a reasonable compromise solution and settlement with Kenneth Paul Bryan in the sum of the policy limits of $50,000, but were unable to conclude their settlement of the litigation because Defendant failed and refused and still

refuses to acknowledge that there was insufficient insurance coverage to satisfy the entire claim of the Plaintiffs for the loss of their children; instead, Defendant demanded that the sum of $5,510 in collision payment made to Lorin Dean Caldwell and the PIPS payments to Plaintiffs be reimbursed to the Defendant out of the insurance policy liability limits of Kenneth Paul Bryan.

15. Defendant State Farm Mutual Automobile Insurance Company failed to join in the litigation and refused to cooperate in settlement of the litigation by the Plaintiffs for the insufficient funds afforded by the insurance coverage evidencing bad faith towards its insureds in attempting to settle the litigation.

16. Plaintiffs investigated the feasibility of litigation and possible recovery against Kenneth Paul Bryan, independent of the insurance coverage and determined that Kenneth Paul Bryan was insolvent.

17. Defendant failed to investigate the feasibility of contingent litigation and possible recovery against Kenneth Paul Bryan, or in the alternative, knew that Kenneth Paul Bryan was essentially judgment proof and insolvent.

18. Defendant knew, or reasonably should have known, that the liability insurance coverage by CUMIS afforded Kenneth Paul

Bryan was wholly inadequate to fully and fairly compensate Plaintiffs for the loss of their children.

19. At all times material herein, Defendant wrongfully and in bad faith demanded of Plaintiffs that the PIPS and collision payments be subrogated and reimbursed to Defendant from the corpus of the $50,000 settlement with CUMIS and Kenneth Paul Bryan.

COUNT II - INTENTIONAL INTERFERENCE WITH CONTRACT AND ECONOMIC RELATIONS

20. Plaintiffs reallege and incorporate by reference herein the allegations contained in paragraphs 1 through 19 above and further allege as follows:

21. Defendant knew, or should have known, that it had no subrogation rights as to Plaintiff Hill and that it had no subrogation rights as to Plaintiff Caldwell until such time as Plaintiffs had been fully and fairly compensated for the loss of their children.

22. Defendant knew of Plaintiffs' negotiations and agreement with CUMIS.

23. Defendant, by the actions set forth hereinabove, intentionally, and without justification, interfered with Plaintiffs' settlement with CUMIS by asserting that it was entitled to subrogation when it knew, or reasonably should have known, it was not so entitled for the improper purpose of forcing

Plaintiffs to relinquish a significant portion of the CUMIS insurance proceeds to which Defendant was not entitled.

COUNT III - PUNITIVE DAMAGES

24. Plaintiffs reallege and incorporate by reference herein the allegations contained in paragraphs 1 through 23 above and further allege as follows:

25. Defendant's actions were taken maliciously and/or with wanton disregard for the rights of the Plaintiffs and, therefore, punitive damages are appropriate.

WHEREFORE, Plaintiffs pray for judgment against Defendant for compensatory and punitive damages in an amount as supported by the allegations contained in this Complaint, for fees and costs of this action and for such other and further relief to which Plaintiffs may be justly entitled.

DATED this 16th day of June, 1989.

ROBERT KENT HILL, et al.,
Plaintiffs

BY: Wallace R. Lauchnor

WALLACE R. LAUCHNOR
Moffat, Paulsen, Lauchnor & Young
261 East Broadway, Suite 300
Salt Lake City, UT 84111
Telephone: (801) 521-7500

AND

BY: _____

ROY A. JACOBSON, JR.
VEHAR, BEPPLER, JACOBSON,
LAVERY & ROSE, P.C.
P.O. Box 189
Kemmerer, WY 83101
Telephone: (307) 877-3973

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of June, 1989, I served the above and foregoing instrument upon Defendant by depositing a true and correct copy of the same in the United States mail, postage prepaid, addressed to Defendant's attorney of record as follows:

Glenn C. Hanni, Esq.
R. Scott Williams, Esq.
Strong & Hanni
Sixth Floor Boston Building
Salt Lake City, UT 84111

Tab L

WALLACE R. LAUCHNOR (1905)
Moffat, Paulsen, Lauchnor & Young
Suite 300
261 East Broadway
Salt Lake City, UT 84111
Telephone: (801) 521-7500

ROY A. JACOBSON, JR. (4480)
V. ANTHONY VEHAR
VEHAR, BEPPLER, JACOBSON, LAVERY & ROSE, P.C.
P.O. Box 189
Kemmerer, WY 83101
Telephone: (307) 877-3973

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

ROBERT KENT HILL, individually, and as personal representative of the heirs of TAMARA ELAINE HILL, deceased, and LORIN DEAN CALDWELL, individually and as personal representative of the heirs of TROY NEIL CALDWELL, deceased, Plaintiffs, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant.	Civil No. C83-8099 MOTION TO WITHDRAW AND ORDER THEREON

MOTION TO WITHDRAW

COMES NOW, Wallace R. Lauchnor, of the firm of Moffat, Paulsen, Lauchnor & Young, and respectfully moves the Court to allow him to withdraw as counsel for Plaintiffs in the above-entitled action on the grounds and for the reason that he may be called to act as a witness in this matter. Substitute counsel for Plaintiffs have made their appearance herein, and all pleadings to be served on Plaintiffs may be mailed to the following:

Roy A. Jacobson, Jr.
V. Anthony Vehar
Vehar, Beppler, Jacobson, Lavery & Rose, P.C.
P.O. Box 189
Kemmerer, Wyoming 83101
Telephone: (307) 877-3973

DATED this 11th day of June, 1989.

/s/ Wallace R. Lauchnor
WALLACE R. LAUCHNOR
Moffat, Paulsen, Lauchnor & Young
Suite 300
261 East Broadway
Salt Lake City, UT 84111
Telephone: (801) 521-7500

0000293

ORDER

The Court, having reviewed and considered the above and foregoing Motion to Withdraw, and good cause appearing therefore, and being otherwise fully advised in the premises,

IT IS HEREBY ORDERED that Wallace R. Lauchnor, of Moffat, Paulsen, Lauchnor & Young, be, and he is hereby granted leave to withdraw as counsel for Plaintiffs in the above-entitled action.

DATED this _____ day of _____, 1989.

DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of June, 1989, I served the above and foregoing instrument upon all interested parties by depositing a true and correct copy of the same in the United States mail, postage prepaid, addressed as follows:

Glenn C. Hanni, Esq.
R. Scott Williams, Esq.
Strong & Hanni
Sixth Floor Boston Building
Salt Lake City, UT 84111

Robert Kent Hill
6734 South 1560 East
Salt Lake City, UT 84121

Lorin Dean Caldwell
7311 Chris Lane
Salt Lake City, UT 84121

Tab M

ROY A. JACOBSON, JR. (4480)
V. ANTHONY VEHAR
P.O. Box 189
Kemmerer, Wyoming 83101
Telephone: (307) 877-3973

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

ROBERT KENT HILL, individually, and as personal representative of the heirs of TAMARA ELAINE HILL, deceased, and LORIN DEAN CALDWELL, individually and as personal representative of the heirs of TROY NEIL CALDWELL, deceased, Plaintiffs, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant.	Civil No. C83-8099 Judge Young PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO AMEND COMPLAINT

COME NOW, the Plaintiffs, by and through their counsel, and respectfully submit the following reply memorandum in support of Plaintiffs' Motion to Amend Complaint.

Although Defendant acknowledges that leave to amend is regularly granted, it has argued that a special rule of law would preclude the granting of leave to amend the Complaint in this

action. Plaintiffs strongly dispute that such a rule of law exists, but even if it does, leave to amend should be granted.

THE CONSISTENCY OR INCONSISTENCY OF PLAINTIFFS' PROPOSED AMENDMENT WITH THE SUPREME COURT'S RULING IS IRRELEVANT

Defendant argues that amendments after remand should not be allowed where they are inconsistent with the Supreme Court's ruling. In support thereof Defendant cites for its only authority: "6 Wright & Miller, Federal Practice and Procedure, Sec. 1498, states, in part:

> 'Once the case has been remanded, the lower court will permit new issues to be presented by an amended pleading that is consistent with the judgment of the appellate court.'"

Such quote is taken horribly out of context; Wright & Miller actually say:

> Although amendments to the original pleadings generally may not be made once the suit has reached the appellate level, if the court of appeals determines that the lower court impliedly tried the case on a theory not set forth in the pleadings, it may permit a conforming amendment - in effect under Rule 15(b) (or at least by analogy to it) - to include that theory in the trial record. More importantly, if the appellate court decides that the district court abused its discretion in refusing to allow an amendment, or did not give a party a sufficient opportunity to cure the defects in his pleadings and state a claim for relief, it may remand the case with directions to allow the appellant to amend. Once the case has been remanded, the lower court will permit new issues to be presented by an amended pleading that is consistent with the judgment of the appellate court. (emphasis added)

THE PROPOSED AMENDMENT IS NOT INCONSISTENT WITH THE SUPREME COURT'S RULING

While the consistency or inconsistency of the Supreme Court's judgment in the instant case is not relevant to whether Plaintiffs should be allowed to amend their complaint, the amendment sought is not inconsistent with the Supreme Court's ruling.

The Supreme Court's actual judgment in Hill v. State Farm Mutual Automobile Insurance Company, 765 P.2d 864 (Utah 1988) was that "Summary Judgment in favor of State Farm on Plaintiffs' Complaints and on State Farm's counterclaim is reversed."

Plaintiffs original complaint set forth all the requisites for a claim for interference with economic relations. It did not specifically claim relief based on intentional interference with economic relations. The amendment sought clearly asks for such relief.

Plaintiffs request the Court enter its order granting leave to Plaintiffs to amend their Complaint.

RESPECTFULLY SUBMITTED this 22nd day of November, 1989.

Roy A. Jacobson, Jr. by VA Vehar

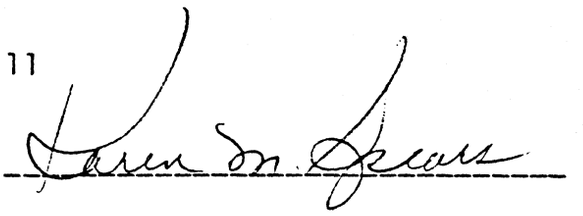
ROY A. JACOBSON, JR. (4480)
V. ANTHONY VEHAR
P.O. Box 189
Kemmerer, Wyoming 83101
Telephone: (307) 877-3973

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of November, 1989, a true and complete copy of the above and foregoing instrument was served upon Defendant by depositing a copy thereof in the United States mail, postage prepaid, addressed as follows:

Glenn C. Hanni, Esq.
Strong & Hanni
Sixth Floor Boston Bldg.
Salt Lake City, Utah 84111



Tab N

ROY A. JACOBSON, JR. [A4480]
V. ANTHONY VEHAR
VEHAR, BEPPLER, JACOBSON,
LAVERY & ROSE
P.O. BOX 890
EVANSTON, WYOMING 82931
(307) 789-4200

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ROBERT KENT HILL, Individually and as personal representative of the heirs of TAMARA ELAINE HILL, deceased, and LORIN DEAN CALDWELL, Individually and as personal representative of the heirs of TROY NEIL CALDWELL, DECEASED, Plaintiffs, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant.	NOTICE OF APPEAL Civil No. C83-8099 Judge David S. Young

The plaintiffs hereby give notice that they appeal the Court's judgment entered March 26, 1990. This Notice of Appeal is filed pursuant to Rule 4, Rules of the Utah Supreme Court.

DATED this 25TH day of April, 1990.

VEHAR, BEPPLER, JACOBSON
LAVERY & ROSE

Roy A. Jacobson, Jr.
V. Anthony Vehar
Attorneys for Plaintiffs

MAILING CERTIFICATE

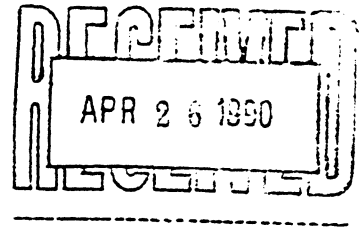
I hereby certify that a true and correct copy of the foregoing instrument was mailed, first class, postage prepaid on this 25th day of April, 1990, to the following counsel of record:

Glenn C. Hanni, Esq.
STRONG & HANNI
Sixth Floor Boston Building
Salt Lake City, Utah 84111

HILL/GBF

Tab O

Glenn C. Hanni #A1327
STRONG & HANNI
Attorneys for Defendant
600 Boston Building
Salt Lake City, Utah 84111
Telephone: 532-7080



IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ROBERT KENT HILL, Individually and as personal representative of the heirs of TAMARA ELAINE HILL, deceased, and LORIN DEAN CALDWELL, Individually and as personal representative of the heirs of TROY NEIL CALDWELL, DECEASED, Plaintiffs, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant.	MOTION FOR SUMMARY JUDGMENT Civil No. C83-8099 Judge David S. Young

Pursuant to Rule 56, Utah Rules of Civil Procedure, defendant moves the court for summary judgment with respect to the remaining claim of plaintiff Caldwell for bad faith against defendant. This motion is made on the grounds that the pleadings, including prior judgment, and affidavits on file establish there is no genuine issue as to any material facts and that defendant is entitled to summary judgment as a matter of

law, as more fully set forth in defendant's memorandum in support hereof filed herewith.

DATED this 21 day of April, 1990.

STRONG & HANNI

By _____
Glenn C. Hanni
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Motion for Summary Judgment was mailed, postage prepaid, on April 24, 1990, to the following:

Wallace R. Lauchnor
Richards, Brandt, Miller & Nelson
50 South Main #700
Salt Lake City, Utah 84144

Roy A. Jacobson, Jr.
V. Anthony Vehar
Vehar, Beppler, Jacobson, Lavery & Rose
P. O. Box 189
Kemmerer, WY 83101

_____

Glenn C. Hanni #A1327
STRONG & HANNI
Attorneys for Defendant
600 Boston Building
Salt Lake City, Utah 84111
Telephone: 532-7080

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ROBERT KENT HILL, Individually and as personal representative of the heirs of TAMARA ELAINE HILL, deceased, and LORIN DEAN CALDWELL, Individually and as personal representative of the heirs of TROY NEIL CALDWELL, DECEASED, Plaintiffs, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant.	MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT Civil No. C83-8099 Judge David S. Young

STATEMENT OF MATERIAL FACTS AS TO WHICH DEFENDANT STATE FARM CLAIMS NO GENUINE ISSUE EXISTS

1. The only issue remaining in this case is plaintiff Caldwell's claim against State Farm for bad faith. Caldwell's complaint against State Farm for bad faith is a first-party insurance bad faith claim. [Judgment, dated 3-26-90.]

2. The issues raised by Caldwell's claim of first-party insurance bad faith against defendant are fairly debatable issues. [Judgment, dated 3-26-90.]

3. The basic background facts relating to this matter were set forth in defendant's Memorandum In Support Of Motion For Summary Judgment As To Plaintiff Hill And Partial Summary Judgment As To Plaintiff Caldwell dated May 4, 1989, which has recently been considered by this court. Defendant reiterates and incorporates herein the statement of material facts from that memo.

4. Plaintiff's complaint was originally filed on or about November 17, 1983. It was dismissed by way of summary judgment entered on October 22, 1984, which summary judgment was subsequently reversed by appeal to the Supreme Court. The case is now back in the District Court on remand, and this court has, by way of its judgment dated March 26, 1990, entered summary judgment dismissing all of plaintiff Hill's claims and dismissing plaintiff Caldwell's claim for punitive damages. [See Judgment dated 3-26-90.]

5. In its opinion reversing the District Court's initial granting of summary judgment, the Supreme Court indicated that the issue it was being asked to decide in this case was "to determine who is entitled to the settlement proceeds." [765 P.2d

at 867] In conjunction therewith, the Supreme Court identified two issues of material fact as to the ultimate question of who was entitled to the disputed $5,510. First, whether plaintiffs were fully compensated for their wrongful death claims without receiving the $5,510; and, second, whether State Farm's subrogation right was prejudiced by plaintiffs' settlement with, and release of, the tortfeasor. The Supreme Court held that if either of those fact issues were decided in favor of State Farm, then State Farm would be entitled to the $5,510. There is no indication whatsoever in the Supreme Court's opinion that State Farm acted in bad faith by refusing to simply let plaintiffs have the $5,510.

ARGUMENT

STATE FARM IS ENTITLED TO SUMMARY JUDGMENT DISMISSING CALDWELL'S CLAIM FOR FIRST-PARTY INSURANCE BAD FAITH BECAUSE THE ISSUES RELATING THERETO ARE FAIRLY DEBATABLE.

Caldwell does not assert any bad faith conduct on the part of State Farm with respect to investigation of his first-party claim for property damage arising out of the accident which resulted in the death of his son. Instead, Caldwell claims State Farm acted in bad faith by refusing to waive its subrogation claim and thereby obstructed Caldwell's settlement with CUMIS Insurance Company, the insurer for the tortfeasor involved in the

accident. This claim of bad faith arises out of the payment of a first-party insurance claim and is therefore a claim of first-party insurance bad faith. This court specifically found that Caldwell's complaint against State Farm is a first-party insurance bad faith claim in its judgment dated March 26, 1990, where the court stated:

> State Farm's motion for partial summary judgment as to Caldwell's claim for punitive damages is granted on the grounds that Caldwell's complaint against State Farm is for first-party insurance bad faith, which is a contract claim, and for which no punitive damages may be awarded absent an allegation of independent tortious conduct. [emphasis added]

That Caldwell's claim constitutes a first-party insurance bad faith claim is clearly shown in Amica Ins. Co. v. Shettler, 768 P.2d 950 (Utah App. 1989) where the court held that conduct by an insurer after payment of a first-party claim which is alleged by the plaintiff to constitute bad faith, is still a claim of first-party insurance bad faith.

In Callioux v. Progressive Ins. Co., 745 P.2d 838 (Utah App. 1987) the Utah Court of Appeals held that there can be no first-party insurance bad faith, as a matter of law, if the claim is fairly debatable. The court stated:

> If the evidence presented creates a factual issue as to the claim's validity, there exists a debatable reason for denial, thereby legitimizing the denial of the claim,

> and eliminating the bad faith claim. "When a claim is fairly debatable, the insurer is entitled to debate it, whether the debate concerns a matter of fact or law." . . .
>
> This general policy was explained by the Utah Supreme Court in Western Casualty & Surety Co. v. Marchant, 615 P.2d 423, 427 (Utah 1980):
>
> > It would not comport with our ideas of either law or justice to prevent any party who entertained bona fide questions about his legal obligations from seeking adjudication thereon in the courts.
>
> [745 P.2d at 842]

Callioux holds that when an issue is fairly debatable, an insurance company is entitled to debate it. Further, the insurance company cannot be found to have acted in bad faith for debating such an issue.

The facts of Callioux are instructive on this issue. Callioux' filed a claim with their insurer, Progressive, for the total loss of their Jeep which they claimed had gone "into an uncontrollable skid, rolled down a hill, and subsequently burned." [745 P.2d at 839]

Progressive denied the claim because its investigation indicated "the loss was of incendiary origin, occurring by or at the direction of David Callioux." [Id.]

Callioux was eventually charged with arson and attempt to

defraud an insurer. He was acquitted of the criminal charges, and Progressive paid the first-party claim in full after the judgment of acquittal.

Callioux then sued Progressive on various theories, including "bad faith denial of a first-party insurance claim." [Id.] The trial court granted Progressive's motion for summary judgment, and Callioux appealed. The Utah Court of Appeals affirmed as indicated above. The court concluded that Callioux' claim was "fairly debatable" as evidenced by the facts, and, therefore, they could not have established bad faith on the part of Progressive. Thus, Progressive was entitled to summary judgment.

The same principle applies in the instant case. The issue as to whether State Farm was required to waive its subrogation claim and was not entitled to any of the $5,510, is and has been throughout the pendency of this case, a fairly debatable issue.

Initially, Judge Billings, then of the Third Judicial District Court, agreed with State Farm's position and dismissed plaintiff's complaint in its entirety on summary judgment. Although the Utah Supreme Court reversed that decision, reversal was on the basis that there were factual issues with respect to who was entitled to the $5,510. The Supreme Court did not foreclose the possibility that State Farm might still be entitled

to the disputed monies depending on the outcome of the factual issues.

Furthermore, the Supreme Court's opinion did not give even the slightest indication of support to plaintiff claim of bad faith. It would have been contradictory for the Supreme Court to indicate State Farm might still be entitled to the money and at the same time suggest State Farm acted in bad faith by asserting its right to those monies.

In its Judgment dated March 26, 1990, this court specifically stated:

> The court further finds that the issues raised by plaintiffs' claims of first-party bad faith against State Farm are and have been throughout the pendency of this action fairly debatable issues. [Judgment of 3-26-90, p. 2, para. 6.]

Since Caldwell's claim is for first-party bad faith, State Farm is entitled to judgment as a matter of law.

State Farm respectfully requests the court to grant its motion for summary judgment and to dismiss Caldwell's remaining claim of bad faith against State Farm, with prejudice, on the merits, no cause of action.

DATED this 20 day of April, 1990.

STRONG & HANNI

By _____
Glenn C. Hanni
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Memorandum in Support of Motion for Summary Judgment was mailed, postage prepaid, on April 24, 1990, to the following:

Roy A. Jacobson, Jr.
V. Anthony Vehar
Vehar, Beppler, Jacobson, Lavery & Rose
P. O. Box 189
Kemmerer, WY 83101

Wallace R. Lauchnor
Richards, Brandt, Miller & Nelson
50 South Main #700
Salt Lake City, Utah 84144

Tab P

GLENN C. HANNI, #A1327
STRONG & HANNI
Attorneys for Defendant
Sixth Floor Boston Building
Salt Lake City, Utah 84111
Telephone: (801) 532-7080

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ROBERT KENT HILL, Individually and as personal representative of the heirs of TAMARA ELAINE HILL, deceased, and LORIN DEAN CALDWELL, Individually and as personal representative of the heirs of TROY NEIL CALDWELL, deceased, Plaintiffs, vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant.	JUDGMENT Civil No. C83-8099 Judge David S. Young

Defendant's motion for summary judgment with respect to the remaining claims of plaintiff, Lorin Dean Caldwell, individually and as personal representative of the heirs of Troy Neil Caldwell, deceased, was filed in April, 1990, along with a memorandum in support of that motion. Plaintiff Caldwell failed to file a response to defendant's motion for summary judgment and memorandum in support thereof. Defendant at the time of filing its motion for summary judgment and memorandum in support thereof filed a request for oral argument. Defendant in May, 1990, served and filed a notice to submit for decision. The court finds that the

issues raised by the claims of bad faith against State Farm by plaintiff Lorin Dean Caldwell, individually and as personal representative of the heirs of Troy Neil Caldwell, deceased, are and have been throughout the pendency of this action fairly debatable issues. The court having considered the records and files of this case including defendant's memorandum in support of its motion for summary judgment, and being fully advised,

IT IS ORDERED, ADJUDGED AND DECREED:

1. For the reasons set forth in defendant's memorandum in support of its motion for summary judgment, said motion is hereby granted and judgment is hereby entered in favor of defendant and against plaintiff, Lorin Dean Caldwell, individually and as personal representative of the heirs of Troy Neil Caldwell, deceased, no cause of action.

2. Defendant's request for oral argument is hereby denied.

Dated this _____ day of June, 1990.

BY THE COURT:

_____
David S. Young, Judge

0000360

Tab Q

have stated, we disagree with that proposition. Defendant does not respond to plaintiff's contention that the endorsement here *does* provide coverage beyond the territorially limited coverage under the policy provision, we therefore do not address that issue.

Affirmed.

74 Or.App. 153

Donald A. PANKOW, Appellant,

v.

STATE of Oregon, Respondent.

CC 84-62; CA A32949.

Court of Appeals of Oregon.

Argued and Submitted March 18, 1985.

Decided June 12, 1985.

Appeal from Circuit Court, Hood River; Donald L. Kalberer, Judge.

Jan Peter Londahl, Portland, argued the cause and filed the brief for appellant.

Robert M. Atkinson, Asst. Atty. Gen., Salem, argued the cause for respondent. With him on the brief were Dave Frohnmayer, Atty. Gen., and James E. Mountain, Jr., Sol. Gen., Salem.

Before BUTTLER, P.J., and WARREN and ROSSMAN, JJ.

PER CURIAM.

Affirmed. *Stelts v. State of Oregon*, 67 Or.App. 364, 677 P.2d 1106, *rev. allowed* 297 Or. 458, 683 P.2d 1371 (1984).

Cite as 701 P.2d 795 (Utah 1985)

Wayne BECK, Plaintiff and Appellant,

v.

FARMERS INSURANCE EXCHANGE, Defendant and Respondent.

No. 18926.

Supreme Court of Utah.

June 12, 1985.

Insured brought action against insurer for alleged bad-faith refusal to settle a claim for insured motorist benefits. The Third District Court, Salt Lake County, Philip P. Fishler, J., entered summary judgment for insurer, and insured appealed. The Supreme Court, Zimmerman, J., held that: (1) in a first-party relationship between an insurer and its insured, the duties and obligations of the parties are contractual rather than fiduciary in nature and, without more, a breach of those implied or express duties can give rise only to a cause of action in contract, not one in tort, and (2) question whether insurer breached its duty of good faith in rejecting insured's claim for uninsured motorist benefits without explanation and in failing to further investigate matter, such that insured was damaged when it was forced to accept settlement offered by insurer because of financial pressure caused by delay in resolving matter, was question of fact precluding summary judgment on contractual theory of failure to fulfill implied contractual duty to deal in good faith.

Reversed and remanded.

1. Insurance ⇐602.1

The good-faith duty to bargain or settle under an insurance contract is only one aspect of the duty of good faith and fair dealing implied in all contracts and is a duty which upon violation may give rise to a claim for breach of contract.

2. Insurance ⇐602.2(1)

Refusal to bargain or settle under an insurance contract may, standing alone, be sufficient to prove a breach under appropriate circumstances.

3. Insurance ⇐602.1

Practical end of providing a strong incentive for insurers to fulfill their contractual obligations to their insureds can be accomplished as well through a contract cause of action upon a failure to bargain in good faith without analytical straining necessitated by the tort approach and with far less potential for unforeseen consequences to the law of contracts.

4. Insurance ⇐602.1

A tort cause of action does not arise in a first-party insurance contract situation by reason of a failure to bargain in good faith because the relationship between the insurer and its insured is fundamentally different than in a third-party context.

5. Insurance ⇐602.1

In a first-party relationship between an insurer and its insured, the duties and obligations of the parties are contractual rather than fiduciary in nature and, without more, a breach of those implied or express duties can give rise only to a cause of action in contract, not one in tort.

6. Insurance ⇐156(1)

As parties to a contract, the insured and the insurer have parallel obligations to perform the contract in good faith, obligations that inhere in every contractual relationship.

7. Insurance ⇐563

The implied contractual obligation of good-faith performance contemplates, at the very least, that the insurer will diligently investigate these acts to enable it to determine whether a claim filed by its insured is valid, will fairly evaluate the claim, and will thereafter act promptly and reasonably in rejecting or settling the claim, and also requires the insurer to deal with laymen as laymen and not as experts in the subtleties of law and underwriting and to refrain from actions that will injure the insured's ability to obtain the benefits of the contract.

Insurance ⇐602.2(1)

Performance of the implied contractual ɔligation of good faith is the essence of hat the insurer has bargained and paid ɔr and, if breached, will render insurer ible for damages suffered in consequence ereof.

Insurance ⇐602.10(1)

Damages recoverable against an insur- for breach of its implied contractual ɔligation of good faith toward insured in- ude both general damages, those flowing aturally from breach, and consequential amages, those reasonably within contem- lation of, or reasonably foreseeable by, arties at time contract was made.

0. Insurance ⇐602.10(1)

In an action against an insurer for reach of a duty to bargain in good faith, iven that insured frequently faces cata- trophic consequences if funds are not vailable within a reasonable period of time ɔ cover an insured loss, damages for a loss ell in excess of policy limits, such as for a ome or a business, may be foreseeable nd provable.

1. Damages ⇐56.10

In unusual cases concerned with an nsurer's breach of a duty to bargain in ood faith, damages for mental anguish to nsured might be provable, but foreseeabil- ty of any such damages will always hinge ɹpon nature and language of contract and easonable expectations of parties.

12. Judgment ⇐181(23)

Question whether insurer breached its luty of good faith in rejecting insured's laim for uninsured motorist benefits with- ɔut explanation and in failing to further ɪnvestigate matter, such that insured was lamaged when it was forced to accept set- tlement offered by insurer because of fi- ɲancial pressure caused by delay in resolv- ɪng matter, was question of fact precluding summary judgment on contractual theory of failure to fulfill implied contractual duty to deal in good faith.

Robert J Debry, Salt Lake City, for plaintiff and appellant.

Don J Hanson, Salt Lake City, for defendant and respondent.

ZIMMERMAN, Justice:

Plaintiff Wayne Beck appeals from a summary judgment dismissing his claim against Farmers Insurance Exchange, his automobile insurance carrier, alleging that Farmers had refused in bad faith to settle a claim for uninsured motorist benefits. We hold that on the record before us, Beck stated a claim for relief and a summary judgment was inappropriate. We reverse and remand for further proceedings consistent with this opinion.

Beck injured his knee in a hit-and-run accident on January 16, 1982, when his car was struck by a car owned by Ann Kirkland. Ms. Kirkland asserted that her car had been stolen and denied any knowledge of or responsibility for the accident. Beck filed a claim with Kirkland's insurer, but liability was denied on April 20, 1982.

At the time of the accident, Beck carried automobile insurance with Farmers. Under that policy, Beck was provided with both no-fault and uninsured motorist insurance benefits. On February 23, 1982, while his claim against Kirkland was pending, Beck filed a claim with Farmers for no-fault benefits. Sometime prior to May 26, 1982, Farmers paid Beck $5,000 for medical expenses (the no fault policy limit) and $1,299.43 for lost wages.

On June 23, 1982, Beck's counsel filed a claim with Farmers for uninsured motorist benefits, demanding the policy limit, $20,000, for general damages suffered as a result of the accident. His counsel alleges that the brochure documenting Beck's damages, submitted to Farmers with the June 23rd settlement offer, established that his claim was worth substantially more than $20,000. Farmers' adjuster rejected the settlement offer without explanation on July 1, 1982.

Beck filed this lawsuit one month later, on August 2, 1982, alleging three causes of

action: first, that by refusing to pay his uninsured motorist claim, Farmers had breached its contract of insurance with him; second, that by acting in bad faith in refusing to investigate the claim, bargain with Beck, or settle the claim, Farmers had breached an implied covenant of good faith and fair dealing; and third, that Farmers had acted oppressively and maliciously toward Beck with the intention of, or in reckless disregard of the likelihood of, causing emotional distress. Under the first claim, Beck sought damages for breach of contract in the amount of the policy limits; under the second, he asked for compensatory damages in excess of the policy limits for additional injuries, including mental anguish; and under the third, he sought punitive damages of $500,000.

Sometime in August of 1982, Beck's counsel contacted Farmers' counsel and offered to settle the whole matter for $20,000. This offer was rejected. Farmers filed an answer on September 1, 1982, and at the same time, moved to strike the prayer for punitive damages on the ground that they were unavailable for a breach of contract. Farmers' motion was granted. On September 29th, the trial court bifurcated the case and agreed to try the claim for failure to pay uninsured motorist benefits independent of Beck's claim alleging breach of an implied covenant of good faith and fair dealing.

Immediately after the trial judge bifurcated the case, Beck's counsel expressly revoked the previously rejected offer to settle the whole matter for $20,000. Instead, Beck offered to settle only the failure to pay the uninsured motorist benefits claim for $20,000, reserving the implied covenant or "bad faith" claim for separate resolution.

On October 20, 1982, Farmers apparently counteroffered. Negotiations proceeded, and sometime in late November, the parties agreed to settle the uninsured motorist claim for $15,000. On December 6, 1982, the parties stipulated to dismissal of that claim and specifically reserved the bad faith claim for later disposition.

In mid-December, Farmers moved to dismiss the reserved bad faith claim on two theories. First, Farmers asserted that under *Lyon v. Hartford Accident and Indemnity Co.*, 25 Utah 2d 311, 480 P.2d 739 (1971), it "had no duty to bargain with or settle plaintiff's uninsured motorist claim and, therefore, [could not] be held liable" for breach of contract or bad faith. Second, Farmers argued that even if it had some duty to bargain or to settle the claim, the facts set forth in the pleadings on file did not establish that it had breached the duty. No memoranda or factual affidavits supported this motion.

Farmers' motion was opposed by affidavits of Beck, his counsel, and a former insurance adjuster who worked for Beck's counsel as a paralegal. In his affidavit, Beck's counsel recited the dates and terms of the various settlement offers and the fact that they had been rejected without counteroffer. Beck's affidavit stated that he had accepted the $15,000 offer only because of financial pressures caused by the substantial expenses he had incurred in the ten months since the accident. The paralegal's affidavit stated that he had been an insurance adjuster for 19 years and that he had reviewed the settlement documentation submitted to Farmers in June when the claim was first filed. He expressed the opinion that a reasonable and prudent insurance company would have valued the claim at between $30,000 and $40,000 and attempted to settle the matter within weeks after the initial offer. The paralegal charged that the "only reason for such a substantial delay in settling this claim would be to put Mr. Beck in a situation of financial need and stress so that he would accept the first settlement offer," a tactic he characterized as acting in bad faith. Farmers filed no rebuttal affidavits, and the trial court granted Farmers' motion without specifying the basis for its holding.

Beck asks this Court to overrule *Lyon* and permit an insured to sue for an insurer's bad faith refusal to bargain or settle. He points out that many states now allow a tort action for breach of an insurer's duty

to deal fairly and in good faith with its insured. Assuming that we abandon *Lyon*, Beck argues that the affidavits submitted in opposition to Farmers' motion for summary judgment were sufficient to create a genuine issue of material fact as to whether Farmers breached an implied covenant of good faith and fair dealing.

Farmers does not now contend, as it did below, that it had no duty to bargain or settle. Instead, it argues that under *Lyon*, an insurer cannot be held liable for bad faith simply because it refused to bargain or to settle a claim; rather, it argues, to sustain such a claim a plaintiff must produce evidence of bad faith wholly apart from the "mere failure" to bargain or settle.

Our ruling in *Lyon* left an insured without any effective remedy against an insurer that refuses to bargain or settle in good faith with the insured. An insured who has suffered a loss and is pressed financially is at a marked disadvantage when bargaining with an insurer over payment for that loss. Failure to accept a proffered settlement, although less than fair, can lead to catastrophic consequences for an insured who, as a direct consequence of the loss, may be peculiarly vulnerable, both economically and emotionally. The temptation for an insurer to delay settlement while pressures build on the insured is great, especially if the insurer's exposure cannot exceed the policy limits. *See Lawton v. Great Southwest Fire Insurance Co.*, 118 N.H. 607, 392 A.2d 576, 579 (1978); Harvey & Wiseman, *First Party Bad Faith: Common Law Remedies and a Proposed Legislative Solution*, 72 Ky.L.J. 141, 146, 167–69 (1983–84) (hereinafter cited as "First Party Bad Faith"); Note, *The Availability of Excess Damages for Wrongful Refusal to Honor First Party Insurance Claims—An Emerging Trend*, 45 Fordham L.Rev. 164, 164–67 (Oct. 1976) (hereinafter cited as "Availability of Excess Damages").

[1, 2] In light of these considerations, we now conclude that an insured should be provided with a remedy. However, we do not agree with plaintiff that a tort action is appropriate. Instead, we hold that the good faith duty to bargain or settle under an insurance contract is only one aspect of the duty of good faith and fair dealing implied in all contracts and that a violation of that duty gives rise to a claim for breach of contract.[1] In addition, we do not adopt the limitation suggested by Farmers, but hold that the refusal to bargain or settle, standing alone, may, under appropriate circumstances, be sufficient to prove a breach.

We recognize that a majority of states permit an insured to institute a tort action against an insurer who fails to bargain in good faith in a "first-party" situation,[2] adopting the approach first announced by the California Supreme Court in *Gruenberg v. Aetna Insurance Co.*, 9 Cal.3d 566, 510 P.2d 1032, 108 Cal.Rptr. 480 (1973). *See, e.g., Bibeault v. Hanover Insurance Co.*, R.I., 417 A.2d 313 (1980); *Craft v. Economy Fire & Casualty Co.*, 572 F.2d 565 (7th Cir.1978) (applying Indiana law); *MFA Mutual Insurance Co. v. Flint*, Tenn., 574 S.W.2d 718 (1978). Apparently, these courts have taken this step as a matter of policy in order to provide what they perceive to be an adequate remedy for an insured wronged by an insurer's recalcitrance. These courts have reasoned that under contract law principles, an insurer who improperly refuses to settle a first-party claim may be liable only for damages measured by the maximum dollar amount of the insurance provided by the policy, and such a damage measure provides little or no incentive to an insurer to promptly and faithfully fulfill its contractual obligations. Accordingly, these courts have adopted a tort approach in order to allow an insured to recover extensive consequential and punitive damages, which they consider to be unavailable in an action based solely on a breach of contract. *See Availability of Excess Damages, supra*, at 168–77; *First Party Bad Faith, supra*, at 158.

[3] We conclude that the tort approach adopted by these courts is without a sound theoretical foundation and has the potential for distorting well-established principles of contract law. Moreover, the practical end of providing a strong incentive for insurers to fulfill their contractual obligations can be accomplished as well through a contract cause of action, without the analytical straining necessitated by the tort approach and with far less potential for unforeseen consequences to the law of contracts.

The analytical weaknesses of the tort approach are easily seen. In *Gruenberg*, the California court held that an insurer has a duty to deal in good faith with its insured and that an insured can bring an action in tort, rather than contract, for breach of that duty because the duty is imposed by law and, being nonconsensual, does not arise out of the contract. Glossing over any distinctions between first- and third-party situations, the court concluded that the duty imposed upon the insurer when bargaining with its insured in a first-party situation is merely another aspect of the fiduciary duty owed in the third-party context. *Gruenberg v. Aetna Insurance Co.*, 9 Cal.3d at 573–74, 510 P.2d at 1037, 108 Cal.Rptr. at 485.

Although this Court, in *Ammerman v. Farmer's Insurance Exchange*, 19 Utah 2d 261, 430 P.2d 576 (1967), recognized a tort cause of action for breach of an insurer's obligation to bargain in a third-party context, we cannot agree with the *Gruenberg* court that the considerations which compel the recognition of a tort cause of action in a third-party context are present in the first-party situation. In *Ammerman*, we stated that because a third-party insurance contract obligates the insurer to defend the insured, the insurer incurs a fiduciary duty to its insured to protect the insured's interests as zealously as it would its own; consequently, a tort cause of action is recognized to remedy a violation of that duty. 19 Utah 2d at 265–66, 430 P.2d at 578–79.

[4] However, in *Lyon v. Hartford Accident and Indemnity Co.*, we held that a tort cause of action did not arise in a first-party insurance contract situation because the relationship between the insurer and its insured is fundamentally different than in a third-party context:

> In the [third-party] situation, the insurer must act in good faith and be as zealous in protecting the interests of the insured as it would be in regard to its own. In the [first-party] situation, the insured and the insurer are, in effect and practically speaking, adversaries.

25 Utah 2d at 319, 480 P.2d at 745 (citations omitted). *See also Lawton v. Great Southwest Fire Insurance Co.*, 392 A.2d at 580–81.

This distinction is of no small consequence. In a third-party situation, the insurer controls the disposition of claims against its insured, who relinquishes any right to negotiate on his own behalf. *Craft v. Economy Fire & Casualty Co.*, 572 F.2d at 569. An insurer's failure to act in good faith exposes its insured to a judgment and personal liability in excess of the policy limits. *Santilli v. State Farm Life Insurance Co.*, 278 Or. 53, 61–62, 562 P.2d 965, 969 (1977). In essence, the contract itself creates a fiduciary relationship because of the trust and reliance placed in the insurer by its insured. *Cf. Hal Taylor Associates v. UnionAmerica, Inc.*, Utah, 657 P.2d 743, 748–49 (1982). The insured is wholly dependent upon the insurer to see that, in dealing with claims by third parties, the insured's best interests are protected. In addition, when dealing with third parties, the insurer acts as an agent for the insured with respect to the disputed claim. Wholly apart from the contractual

1. The Court in *Lyon* considered only the question of whether a claim of bad faith gave rise to a tort cause of action; however, to the extent that *Lyon* is philosophically inconsistent with our recognition today of a cause of action in contract, it is overruled.

2. We use the term "first-party" to refer to an insurance agreement where the insurer agrees to pay claims submitted to it by the insured for losses suffered by the insured. The present case involves such a first-party situation. In contrast, a "third-party" situation is one where the insurer contracts to defend the insured against claims made by third parties against the insured and to pay any resulting liability, up to the specified dollar limit.

obligations undertaken by the parties, the law imposes upon all agents a fiduciary obligation to their principals with respect to matters falling within the scope of their agency. *Id.* at 748; *see generally* 3 Am. Jur.2d *Agency* § 199 (1962).

In the first-party situation, on the other hand, the reasons for finding a fiduciary relationship and imposing a corresponding duty are absent. No relationship of trust and reliance is created by the contract; it simply obligates the insurer to pay claims submitted by the insured in accordance with the contract. *Santilli v. State Farm Life Insurance Co.*, 278 Or. at 61–62, 562 P.2d at 969. Furthermore, none of the indicia of agency are present. *See generally Duncan v. Andrew County Mutual Insurance Co.*, Mo.App., 665 S.W.2d 13, 18–20 (1984).

Clearly, then, it is difficult to find a theoretically sound basis for analogizing the duty owed in a third-party context to that owed in a first-party context. And wholly apart from any theoretical problems, tailoring the tort analysis to first-party insurance contract cases has proven difficult. The pragmatic reason for adopting the tort approach is that it exposes insurers to consequential and punitive damages awards in excess of the policy limits. However, the courts appear to have had difficulty in developing a sound rationale for limiting the tort approach to insurance contract cases. This may be because there is no sound theoretical difference between a first-party insurance contract and any other contract, at least no difference that justifies permitting punitive damages for the breach of one and not the other. In any event, the tort approach and the accompanying punitive damages have moved rather quickly into areas far afield from insurance. *See, e.g., Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*, 36 Cal.3d 752, 686 P.2d 1158, 1166–67, 206 Cal.Rptr. 354, 362–63 (1984); *Wallis v. Superior Court*, 160 Cal.App.3d 1109, 207 Cal.Rptr. 123, 127–29 (1984); *Gates v. Life of Montana Insurance Co.*, Mont., 668 P.2d 213, 214–16 (1983).

Furthermore, the courts adopting the tort approach have had some difficulty in determining what degree of bad faith is necessary to sustain a claim. *E.g., Anderson v. Continental Insurance Co.*, 85 Wis.2d 675, 692–94, 271 N.W.2d 368, 376–77 (1978). From a practical standpoint, the state of mind of the insurer is irrelevant; even an inadvertent breach of the covenant of good faith implied in an insurance contract can substantially harm the insured and warrants a remedy.

[5, 6] We therefore hold that in a first-party relationship between an insurer and its insured, the duties and obligations of the parties are contractual rather than fiduciary. Without more, a breach of those implied or express duties can give rise only to a cause of action in contract, not one in tort.[3] This position has not been widely adopted by other courts, although a "respectable body of authority" is developing. *See Duncan v. Andrew County Mutual Insurance Co.*, 665 S.W.2d at 18–19, and cases cited therein; *Lawton v. Great Southwest Fire Insurance Co.*, 118 N.H. 607, 392 A.2d 576 (1978); *Kewin v. Massachusetts Mutual Life Insurance Co.*, 409 Mich. 401, 295 N.W.2d 50 (1980); *Availability of Excess Damages, supra* p. 4, at 168–71. We further hold that as parties to a contract, the insured and the insurer have parallel obligations to perform the contract in good faith, obligations that inhere in every contractual relationship. *State Automobile & Casualty Underwriters v. Salisbury*, 27 Utah 2d 229, 232, 494 P.2d 529, 531 (1972); *Leigh Furniture & Carpet Co. v. Isom*, Utah, 657 P.2d 293, 306 (1982).[4]

[7, 8] Few cases define the implied contractual obligation to perform a first-party insurance contract in good faith. However, because the considerations are similar, we freely look to the tort cases that have described the incidents of the duty of good faith in the context of first-party insurance contracts. From those cases and from our own analysis of the obligations undertaken by the parties, we conclude that the implied obligation of good faith performance contemplates, at the very least, that the insurer will diligently investigate the facts to enable it to determine whether a claim is valid, will fairly evaluate the claim, and will thereafter act promptly and reasonably in rejecting or settling the claim. *See Anderson v. Continental Insurance Co.*, 85 Wis.2d at 692–93, 271 N.W.2d at 377; *Egan v. Mutual of Omaha Insurance Co.*, 24 Cal.3d 809, 818–19, 620 P.2d 141, 145–46, 169 Cal.Rptr. 691, 695–96 (1979). The duty of good faith also requires the insurer to "deal with laymen as laymen and not as experts in the subtleties of law and underwriting" and to refrain from actions that will injure the insured's ability to obtain the benefits of the contract. *MFA Mutual Insurance Co. v. Flint*, 574 S.W.2d at 720, *quoting Merchants Indemnity Corp. v. Eggleston*, 37 N.J. 114, 122, 179 A.2d 505, 509 (1962); *accord Bowler v. Fidelity & Casualty Co.*, 53 N.J. 313, 327, 250 A.2d 580, 587 (1969). These performances are the essence of what the insured has bargained and paid for, and the insurer has the obligation to perform them. When an insurer has breached this duty, it is liable for damages suffered in consequence of that breach.

In adopting the contract approach, we are not ignoring the principal reason for the adoption of the tort approach—to provide damage exposure in excess of the policy limits and thus remove any incentive for breaching the duty of good faith. Despite what some courts have suggested, *e.g., Santilli v. State Farm Insurance Co.*, 562 P.2d at 969, and what some commentators have asserted, *e.g.*, J. Appleman, *Insurance Law & Practice* § 8878.15 at 424–26 (1981), there is no reason to limit damages recoverable for breach of a duty to investigate, bargain, and settle claims in good faith to the amount specified in the insurance policy.[5] Nothing inherent in the contract law approach mandates this narrow definition of recoverable damages. Although the policy limits define the amount for which the insurer may be held responsible in performing the contract, they do not define the amount for which it may be liable upon a breach. *Lawton v. Great Southwest Fire Insurance Co.*, 392 A.2d at 579.

[9] Damages recoverable for breach of contract include both general damages, *i.e.*, those flowing naturally from the breach, and consequential damages, *i.e.*, those reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made. *Pacific Coast Title Insurance Co. v. Hartford Accident & Indemnity Co.*, 7 Utah 2d 377, 379, 325 P.2d 906, 907 (1958), *citing Hadley v. Baxendale*, 9 Exch. 341, 156 Eng.Rep. 145 (1854). We have repeatedly recognized that consequential damages for breach of contract may reach beyond the bare contract terms. *See, e.g., Pacific Coast Title Insurance Co. v. Hartford Accident & Idemnity*, 7 Utah 2d at 379, 325 P.2d at 908

3. We recognize that in some cases the acts constituting a breach of contract may also result in breaches of duty that are independent of the contract and may give rise to causes of action in tort. *Hal Taylor Assoc. v. UnionAmerica*, 657 P.2d at 750; *Lawton v. Great Southwest Fire Ins. Co.*, 392 A.2d at 580. For example, the law of this state recognizes a duty to refrain from intentionally causing severe emotional distress to others. *Samms v. Eccles*, 11 Utah 2d 289, 358 P.2d 344 (1961). Thus, intentional and outrageous conduct by an insurer against an insured, coupled with a failure to bargain, could conceivably result in tort liability independent of (and concurrent with) liability for breach of contract. Additionally, the facts that give rise to a breach of the duty to bargain in good faith could also amount to fraudulent activity, rendering an insurer independently liable for damages flowing from the fraud. *See Wetherbee v. United Ins. Co.*, 265 Cal.App.2d 921, 71 Cal.Rptr. 764 (1968). Also, under various unfair practices acts, there may be statutory requirements that give rise to independent causes of action. *E.g.*, U.C.A., 1953, §§ 31-27-1 to -24.

4. The duty to perform the contract in good faith cannot, by definition, be waived by either party to the agreement.

5. In *Ammerman*, we suggested in dicta that in an action for breach of an insurance policy, the damages could not exceed the policy limits. 19 Utah 2d at 264, 430 P.2d at 578. We expressly disavow this dicta.

torney fees incurred for settling and de-ıding claims were foreseeable result of ntractor's default); *Bevan v. J.H. Con-ıuction Co.*, Utah, 669 P.2d 442, 444)83) (home purchasers entitled to dam-es for loss of favorable mortgage inter-t rate resulting from builder's breach of ntract).

[10, 11] In an action for breach of a ıty to bargain in good faith, a broad ınge of recoverable damages is conceiva-e, particularly given the unique nature ıd purpose of an insurance contract. An ısured frequently faces catastrophic con-equences if funds are not available within reasonable period of time to cover an ısured loss; damages for losses well in xcess of the policy limits, such as for a ome or a business, may therefore be fore-eeable and provable. *See, e.g., Reichert v. ieneral Insurance Co.*, 59 Cal.Rptr. 724, 28, 428 P.2d 860, 864 (1967), *vacated on ther grounds*, 68 Cal.2d 822, 442 P.2d 377, 9 Cal.Rptr. 321 (1968) (because bankrupt-y was a foreseeable consequence of fire nsurer's failure to pay, insurer was liable for consequential damages flowing from ankruptcy). Furthermore, it is axiomatic hat insurance frequently is purchased not nly to provide funds in case of loss, but to provide peace of mind for the insured or his beneficiaries. Therefore, although other courts adopting the contract approach have been reluctant to allow such an award, *Lawton v. Great Southwest Fire Insurance Co.*, 392 A.2d at 581–82, we find no difficulty with the proposition that, in unusual cases, damages for mental anguish might be provable.[6] *See Kewin v. Massachusetts Mutual Life Insurance Co.*, 409 Mich. at 440–55, 295 N.W.2d at 64–72 (Williams, J., dissenting); *cf. Lambert v. Sine*, 123 Utah 145, 150, 256 P.2d 241, 244 (1953). The foreseeability of any such damages will always hinge upon the nature and language of the contract and the reasonable expectations of the parties. J. Calamari & J. Perillo, *Contracts* § 14-5 at 523–25 (2d ed. 1977).

With the foregoing principles in mind, we return to a consideration of the present case. The trial court granted summary judgment for the insurer in the face of affidavits of the insured, his counsel, and a paralegal who had been an adjuster for many years. In the absence of any responsive affidavits, we take the assertions of the affidavits as true and view all unexplained facts in a light most favorable to Beck. It appears that the insurer was served with Beck's claim on June 23, 1982. On July 1st, the claim was rejected without explanation and without any request for additional facts. The insured heard nothing more from the insurer until after August 2d, when this suit was filed. The affidavits state that the insured accepted the settlement offered by the insurer in late October because of the financial pressure caused by the delay in resolving the matter. The affidavits also offer the opinion of the expert adjuster turned paralegal that the delay was in bad faith.

From January until late June, Beck was apparently negotiating with the car owner's carrier and not with Farmers, for no claim was filed with Farmers until June 23rd. Therefore, none of the delay between January and June 23rd can be attributed to Farmers. The unexplained delay thereafter, however, together with a flat rejection of plaintiff's offer, provides a factual basis for this cause of action sufficient to withstand summary judgment. Farmers had an obligation to diligently investigate and evaluate Beck's claim. It rejected the claim in one week, and we must infer that the insurer did nothing to investigate or evaluate the claim during the following month.

[12] Under these circumstances and resolving all doubts in Beck's favor, we cannot say that a jury could not find that Farmers breached its duty of good faith in rejecting Beck's claim without explanation and in failing to further investigate the matter. Therefore, we remand the matter to the trial court for further proceedings.

HALL, C.J., and STEWART, HOWE and DURHAM, JJ., concur.

6. Clearly, damages will not be available for the mere disappointment, frustration, or anxiety normally experienced in the process of filing an insurance claim and negotiating a settlement with an insurer.

Claron D. BAILEY, Plaintiff and Respondent,

v.

DESERET FEDERAL SAVINGS AND LOAN ASSOCIATION, Defendant and Appellant.

No. 18961.

Supreme Court of Utah.

June 19, 1985.

Assignee of second deed of trust filed action requesting that he be awarded excess sale proceeds over amount due holder of first deed of trust. The Third District Court, Salt Lake County, Homer F. Wilkinson, J., found for assignee, and holder of first deed of trust appealed. The Supreme Court, Durham, J., held that affidavit of attorney representing assignee of second deed of trust establishing that bankruptcy judge dismissed assignee's complaint seeking to stay trustee's sale because of secured claims on debtor's property and because bankruptcy court had no interest in funds, and that bankruptcy judge had earlier favorably responded to statement that assignee would prefer to go to state court, demonstrated that bankruptcy court did not make adjudication on merits, and thus, bankruptcy court's dismissal was not res judicata so as to bar state court action by assignee seeking to recover excess sale proceeds over amount due holder of first deed of trust.

Affirmed.

Stewart, J., concurred in result.

1. Appeal and Error ⇐201(1)

In action brought by assignee of second deed of trust seeking to be awarded excess sale proceeds over amount due holder of first deed of trust, holder of first deed of trust, by failing to interpose any objection at trial to use of affidavit of plaintiff's attorney, waived objection on basis of allegation that such affidavit was hearsay, and could not raise such issue for first time on appeal.

2. Judgment ⇐654

Finding that court does not have jurisdiction is not the sort of adjudication that can serve as basis for res judicata on merits.

3. Judgment ⇐829(3)

Affidavit of attorney representing assignee of second deed of trust establishing that bankruptcy judge dismissed assignee's complaint seeking to stay trustee's sale because of secured claims on debtor's property and because bankruptcy court had no interest in funds, and that bankruptcy judge had earlier favorably responded to statement that assignee would prefer to go to state court, demonstrated that bankruptcy court did not make adjudication on merits, and thus, bankruptcy court's dismissal was not res judicata so as to bar state court action by assignee seeking to recover excess sale proceeds over amount due holder of first deed of trust.

Edward M. Garrett, Joseph E. Hatch, Salt Lake City, for defendant and appellant.

J. Steven Newton, Salt Lake City, for plaintiff and respondent.

DURHAM, Justice:

The plaintiff, a mechanic's lien holder and assignee of a second position trust deed, filed a complaint with the federal bankruptcy court asking the court to stay a

Tab R

care would have incurred the risk, despite his knowledge of it, and if so, whether he would have conducted himself in the manner in which the plaintiff acted in light of all the surrounding circumstances, including the appreciated risk.

Jacobsen Constr. Co., 619 P.2d at 312

[8] It is well-settled that a plaintiff, acting in a reasonably prudent manner, has a duty to foresee a danger, *Moore v. Burton Lumber & Hardware Co.*, 631 P.2d at 870, particularly one that is plainly visible, and avoid it. *Hindmarsh v. O.P. Skaggs Foodliner*, 21 Utah 2d 413, 416–17, 446 P.2d 410, 412 (1968). If a plaintiff fails to see or sees but fails to avoid the danger, then the plaintiff acted negligently. *See Pollesche v. K-Mart Enterprises of Utah, Inc.*, 520 P.2d 200, 203 (Utah 1974) (plaintiff who sees and ignores the danger is guilty of contributory negligence as a matter of law); *Hindmarsh*, 21 Utah 2d 413 at 417, 446 P.2d at 412; *Whitman v. W.T. Grant Co.*, 16 Utah 2d 81, 83, 395 P.2d 918, 920 (1964) (plaintiff can be negligent either in failing to look or in failing to heed what he or she saw).

Instruction twenty-five, when read together with all of the other instructions given on negligence, is a correct statement of a plaintiff's duty in a negligence action. Nowhere in instruction twenty-five, nor in any of the other remaining thirty-eight instructions, did the trial court intimate that if Deats was negligent then she was *precluded* from recovering. On the contrary, the instructions, when read in their entirety, adequately informed the jury of CSB's duty of care as a property owner, Deats' duty of care, and most importantly, of the procedure by which the jury must apportion negligence if both parties were found to have acted negligently.

The trial court properly denied Deats' motion for a new trial. The evidence supporting the jury's findings was ample and convincing, and the verdict, therefore, was not unreasonable nor unjust. *Roylance*, 737 P.2d at 234; *Nelson v. Trujillo*, 657 P.2d 730, 732 (Utah 1982).

Affirmed. Costs to Commercial Security Bank.

BENCH and GREENWOOD, JJ., concur.

William Ray GAGON, Plaintiff and Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a/k/a State Farm Insurance Companies, Defendant and Respondent.

No. 860137–CA.

Court of Appeals of Utah

Dec. 18, 1987

Insured brought action against automobile insurer for payment of claim and bad faith refusal to pay claim. The District Court, John A. Rokich, J., directed verdict in favor of insurer on bad faith issue. Insured appealed. The Court of Appeals, Greenwood, J., held that evidence created jury question whether insurer refused to pay claim in bad faith.

Reversed and remanded.

1. **Insurance ⇐602.12(2)**

Evidence created jury questions whether insured should have known that oil pump was damaged after metal object fell from pickup truck and struck underside of car, whether insurer fairly evaluated claim for damage to engine as result of nonfunctioning oil pump, and whether insurer refused to pay in bad faith.

2. **Pretrial Procedure ⇐752**

Evidence of punitive damages was inadmissible in insured's action against insurer for payment of claim and bad faith refusal to pay claim where judge stated on record immediately prior to trial that parties and court agreed to exclude evidence of punitive damages unless and until jury found bad faith, and where no objection was voiced by insured.

3. **Insurance ⇐602.12(2)**

Evidence of attorney fees were inadmissible until insured established that insurer breached implied obligation of good faith by refusal to pay claim.

John D. Parken (argued), Marcella I Keck, Dart, Adamson & Parken, Salt Lake City, for plaintiff and appellant.

Paul Belnap (argued), Strong & Hanni, Salt Lake City, for defendant and respondent.

Before GREENWOOD, BILLINGS and BENCH, JJ

OPINION

GREENWOOD, Judge.

Plaintiff, William Ray Gagon, brought this action against defendant, State Farm Mutual Automobile Insurance Company (State Farm), for payment of his insurance claim and for alleged bad faith refusal to pay his claim. Plaintiff appeals from the trial court's directed verdict against him on the bad faith issue. We reverse and remand.

On September 17, 1983, plaintiff was driving his 1979 Fiat Spider when a metal object fell out of the back of a pickup truck he was following and struck the underside of his car. Plaintiff stopped his car and noted that the plastic spoiler under the front grill had been broken, but he could see no oil or other evidence of damage to the car. Plaintiff then restarted the car and drove about three miles. While driving, he noticed that the car lacked power and that he was unable to drive faster than forty-five or fifty miles per hour. Towards the end of the three miles, he observed that the oil light was on. He stopped the car, tried to push it and briefly attempted to restart it. When the car would not start, plaintiff had it towed to Steve Harris Imports where inspection revealed that the oil pump was broken. Because the oil pump stopped functioning, the engine was damaged due to loss of lubrication, costing $1,517.99 to repair.

Plaintiff reported the incident to State Farm on September 19, 1983. On September 23, State Farm's appraiser examined the vehicle and prepared a damage estimate indicating that State Farm would only cover the external damage to the car and not the internal damage due to loss of lubrication. On October 5, 1983, plaintiff went to State Farm's office and signed a statement explaining the circumstances of the incident. On October 12, 1983, State Farm's claims committee determined that plaintiff's claim would be denied "for internal repairs to the engine because of mechanical failure—wear and tear." On October 18, 1983, State Farm informed plaintiff of its decision to deny coverage for internal repairs and allow coverage for only the external damage. In December 1983, plaintiff initiated this action alleging that State Farm's refusal to pay his claim was in bad faith.

On the first day of trial, the parties stipulated that the case would be tried on the bad faith issue, and if the jury found bad faith, plaintiff could then submit evidence of punitive damages. On the second day of trial, the court disallowed plaintiff's evidence of attorney fees with the proviso that he would reconsider the admissibility of attorney fees if the jury found bad faith After the parties had presented their evidence, both parties moved for a directed verdict. The trial judge granted State Farm's motion on the issue of whether State Farm acted in bad faith in refusing to pay plaintiff's insurance claim and denied plaintiff's motion regarding coverage under the policy for engine damage. The judge then allowed the jury to determine whether plaintiff was entitled to all the damages resulting from the accident. The jury awarded plaintiff $1,517.99, less plaintiff's insurance deductible of $200, plus ten percent interest from September 17, 1983. Plaintiff appeals claiming that the trial court erred in granting State Farm's motion for a directed verdict on the bad faith

claim since reasonable minds could have found that State Farm acted in bad faith. Plaintiff also contends that the trial court erred in excluding evidence of punitive damages and consequential damages including attorney fees.

I.

[1] In reviewing a directed verdict, the court must examine all the evidence in the light most favorable to the losing party. *Acculog, Inc. v. Peterson*, 692 P.2d 728, 732 (Utah 1984). If the evidence permits reasonable persons to reach different conclusions on the issues, the directed verdict should not be granted. *Little Am. Ref. Co. v. Leyba*, 641 P.2d 112, 114 (Utah 1982); *Cerritos Trucking Co. v. Utah Venture No. 1*, 645 P.2d 608, 611 (Utah 1982).

After the trial court granted State Farm's motion for a directed verdict on the bad faith issue, the Utah Supreme Court rendered *Beck v. Farmers Insurance Exchange*, 701 P.2d 795 (Utah 1985).[1] In *Beck*, the Court held that "as parties to a contract, the insured and the insurer have parallel obligations to perform the contract in good faith." *Id.* at 801. The Court then defined the obligation of good faith as contemplating that "the insurer will diligently investigate the facts to enable it to determine whether a claim is valid, will fairly evaluate the claim, and will thereafter act promptly and reasonably in rejecting or settling the claim." *Id.* In addition, the Court stated that the duty of good faith "requires the insurer to 'deal with laymen as laymen and not as experts in the subtleties of law and underwriting' and to refrain from actions that will injure the insured's ability to obtain the benefits of the contract." *Id.*

With these principles in mind and viewing the evidence in the light most favorable to plaintiff, we examine whether reasonable minds could differ as to whether State Farm breached its obligation of good faith. It was undisputed that State Farm denied coverage for plaintiff's claim because "the damages sustained to the internal parts of the engine were not a result of a collision loss but rather a result of a mechanical failure, wear and tear." However, State Farm's claims manual states:

MOTOR DAMAGE FROM LOSS OF OIL:

....

Claims for damage to the motor caused by the loss of oil following a roadbed collision will qualify for payment under any form of Collision Coverage.

A roadbed collision shall be deemed to be any contact between the insured vehicle and the roadbed, or any object fixed, frozen or imbedded in the road such as a rock, stump, or any other stationary object.

There should be a reasonable compliance with that condition of the policy which provides, 'When loss occurs the named insured shall use every reasonable means to protect the damaged property covered by this policy from any further damage.'

This has the effect of treating motor damage following a roadbed collision as a part of the direct damage, instead of indirect damage. Reference to the Conditions Section is made because the payment should not include any amount for damage resulting from the further operation of the vehicle after damage to the oil pan or to the motor has become known to the operator, or after the existence of damage should have become known by the operator exercising reasonable care.

At trial plaintiff testified that he was in the wholesale jewelry business and had never worked on cars other than adding windshield washer fluid, radiator fluid and oil. He also testified that he had stopped his car after hitting the metal object, looked under the car and did not see any oil. After inspecting the car, he drove for another three miles before he noticed a loss of power, observed that the oil light was on and stopped the car. In addition, there was conflicting testimony as to whether the loss of lubrication occurred within seconds of impact with the metal object or whether plaintiff caused the damage by continuing to operate the vehicle. Plaintiff's witness, Gary Majnik, who repaired his car, testified that an engine in a Fiat Spider could be damaged by loss of lubrication within seconds of hitting an object. Plaintiff also called another mechanic, Steve Crane, who testified that a person without general knowledge of mechanics, who hit something on the underside of a 1979 Fiat and dented the oil pan, would not know whether to continue driving the car other than as indicated by the warning systems in the car. He also stated that the warnings systems can malfunction.

Based on these facts, we find that reasonable minds could differ as to whether plaintiff, exercising reasonable care, knew or should have known that the oil pump was damaged and that he should not continue to drive the car. Further, we conclude that reasonable persons could reach different conclusions as to whether State Farm fairly evaluated the claim and acted reasonably in rejecting or settling the claim. Therefore, we hold that, in light of *Beck*, the directed verdict on the bad faith issue was improperly granted, and the issue should have been decided by the jury.

II.

[2, 3] The second issue is whether the court improperly excluded evidence of punitive damages and consequential damages including attorney fees. Immediately prior to the trial in this case, the judge stated on the record that the parties and the court agreed to exclude evidence of punitive damages unless and until the jury found that State Farm had acted in bad faith. No objection was voiced by plaintiff. Therefore, we find no merit in plaintiff's claim that evidence of punitive damages was improperly excluded. On the second day of trial, the court stated that it would exclude evidence of attorney fees but would reserve the right to later admit evidence of attorney fees if the jury found bad faith. Generally, attorney fees are not chargeable to an opposing party unless there is contractual or statutory liability for them. *Espinoza v. Safeco Title Ins. Co.*, 598 P.2d 346, 348 (Utah 1979). However, according to *Beck*, consequential damages such as attorney fees may be recoverable in an insurance carrier lack of good faith case. *Beck*, 701 P.2d at 801–02. Therefore, we find no error in the exclusion of attorney fees until after plaintiff established that State Farm breached its implied obligation of good faith. If lack of good faith is found on remand, consideration of punitive damages and consequential damages will be appropriate.

Reversed and remanded.

BILLINGS and BENCH, JJ., concur.

1. *Beck* overruled *Lyon v. Hartford Accident and Indemnity Co.*, 25 Utah 2d 311, 480 P.2d 739 (1971) to the extent that *Lyon* was philisophically inconsistent with the *Beck* Court's recognition of a cause of action in contract for the insurer's failure to perform the contract in good faith and [illegible] the question of whether a claim of bad faith gave rise to a tort cause of action. *Beck*, 701 P.2d at 798 n. 1. The Court characterized the ruling in *Lyon* as leaving "an insured without any effective remedy against an insurer that refuses to bargain or settle in good faith with the insured." *Id.* at 798.

Tab S

COURT OF APPEALS OF OREGON

AFFIRMED WITHOUT OPINION

95 Or.App. 760

March 22, 1989

Charapata v. Hegstrom
Martin, Matter of Guardianship of
Martin, Matter of Marriage of
State v. Beasley
State v. Jackson

March 29, 1989

Bird v. Maass
Caron v. Employment Div.
Courter v. Employment Div.
EBI Companies v. Gilmore
Engel v. Winkel
Engel By and Through Engel, v. Winkel
Fu v. Oregon Liquor Control Com'n
Gilmore, Matter of Compensation of
Lindsey v. Board of Dentistry
McClure v. Mickelson
McKenzie v. Employment Div.
Macomber, Matter of
Macomber v. Employment Div.
State v. Miller
State v. Moritz
Withers v. Motor Vehicles Div.

William Ray GAGON, Plaintiff and Respondent,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant and Petitioner.

No. 880060.

Supreme Court of Utah.

Sept. 28, 1988.

Appeal from Third District Court, Salt Lake County; John A. Rokich, J.

Paul M. Belnap, Stephen J. Trayner, Salt Lake City, for defendant and petitioner.

John D. Parken, Marcella L. Keck, Salt Lake City, for plaintiff and respondent.

ORDER

The above-entitled petition for writ of certiorari having been heretofore considered, it is hereby ordered that the same be denied.

ZIMMERMAN, Justice (concurring in denial of certiorari):

Defendant State Farm Mutual Insurance Company ("State Farm") seeks review of the Court of Appeals' opinion, 746 P.2d 1194 (Utah App.1987), which reversed the trial court's grant of a directed verdict in favor of State Farm on plaintiff William Ray Gagon's claim that State Farm had acted in bad faith in refusing to pay an insurance claim. The Court today denies the writ. I agree that the holding below is correct; however, I write separately for the purpose of disavowing the implications of dicta in the last sentence of the Court of Appeals' opinion.

The Court of Appeals first properly held that the facts were sufficient to go to the jury on the question of whether State Farm had breached the covenant of good faith and fair dealing described in *Beck v. Farmers Ins. Exch.*, 701 P.2d 795 (Utah 1985). The Court of Appeals then properly held that, under the facts of this case, the trial court had not erred in excluding evidence of punitive damages and consequential damages, which consist of attorney fees, when it sent to the jury the separate question of whether State Farm had breached the contract of insurance when it refused to pay the claim. The Court of Appeals then remanded the case to the trial court so that the question of breach of the *Beck* covenant could be sent to the jury. All this is an appropriate handling of the trial court's ruling.

In the last sentence of its opinion, however, the Court of Appeals states: "If lack of good faith is found on remand, consideration of punitive damages ... will be appropriate." 746 P.2d at 1197. While this statement is not part of the Court of Appeals' holding, the trial court may consider this dictum binding on remand. Specifically, the trial judge may feel compelled to permit the jury to award punitive damages if Gagon shows nothing more than a breach of the *Beck* covenant of good faith. To do so would be error under *Beck*. Therefore, I think it important to state that this possibly casual remark by the Court of Appeals should not be considered an accurate or binding statement of the law on the availability of punitive damages.

In *Beck*, we were very careful to make it plain that a claim for an insurer's breach of its implied covenant to act in good faith toward its insured did not, alone, give rise to a cause of action in tort; rather, the cause of action was one in contract. While consequential damages for breach of the covenant would be available, tort damages, including punitive damages, would not. To recover punitive damages, a plaintiff would have to show all of the elements of a separate tort. *Beck*, 701 P.2d at 800–02 & n. 3. Accordingly, under *Beck*, a plaintiff is not entitled to put on evidence of punitive damages unless he or she can make out a sufficient case to go to the jury on an independent tort theory. *Id.*

DURHAM, J., concurs in the concurring opinion of ZIMMERMAN, J.

STATE of Utah, Plaintiff and Respondent,

v.

Karen Marie JOHNSON, Defendant and Appellant.

No. 870222–CA.

Court of Appeals of Utah.

March 21, 1989.

Rehearing Denied April 5, 1989.

Defendant was convicted in the Third District, Salt Lake County, Raymond S. Uno, J., of possession of controlled substance, and she appealed. The Court of Appeals, Garff, J., held that: (1) motor vehicle passenger was seized within meaning of Fourth Amendment when deputy sheriff who had stopped vehicle took passenger's name and birthdate and expected her to wait while he ran warrants check, but (2) seizure of passenger, who became defendant, constituted temporary detention supported by reasonable articulable suspicion that passenger had committed crime.

Affirmed.

Orme, J., filed dissenting opinion.

1. Criminal Law ⇐1030(2)

Court of Appeals would not consider claim raised for first time on appeal, that Utah Constitution and law provide greater protection than Fourth Amendment of United States Constitution against unreasonable search and seizure. U.S.C.A. Const.Amend. 4; Const. Art. 1, § 14; U.C.A.1953, 77-7-15.

2. Arrest ⇐68(4)

Motor vehicle passenger was seized within meaning of Fourth Amendment when deputy sheriff who had stopped vehicle took passenger's name and birthdate and expected her to wait while he ran warrants check; under totality of the circumstances, passenger was reasonably justified in belief that she was not free to go. U.S.C.A. Const.Amend. 4.

3. Automobiles ⇐349(17, 18)

Fourth Amendment seizure of motor vehicle passenger constituted temporary detention supported by reasonable articulable suspicion that passenger had committed crime; trial judge believed deputy sheriff's testimony that deputy believed there was possibility vehicle he had stopped for having faulty brake light was stolen as driver was not registered owner and was unable to find vehicle registration, it was reasonable to ask passenger her name to determine if her names corresponded with owner's name that had been learned prior to stopping of vehicle, and passenger was not detained for unreasonable period of time. U.S.C.A. Const.Amend. 4.

Debra K. Loy, Joan C. Watt (argued), Salt Lake Legal Defenders, Salt Lake City, for defendant and appellant.

R. Paul Van Dam, Atty. Gen., Dan R. Larsen (argued), Asst. Atty. Gen., for plaintiff and respondent.

Before DAVIDSON, GARFF and ORME, JJ.

OPINION

GARFF, Judge:

Defendant, Karen Marie Johnson, appeals the trial court's denial of her motion to suppress and her conviction for possession of a controlled substance.[1] We affirm.

On November 3, 1986, Deputy Sheriff Stroud stopped a vehicle for having a faulty brake light. Defendant was a passenger in that vehicle. At the suppression hearing, Stroud testified that prior to stopping the vehicle, he ran a check on the license plate and obtained the name of the registered owner. He then approached the stopped vehicle and asked the driver for her license. The name on the license was not the name of the registered owner.

1. At a bench trial, defendant was convicted on stipulated facts testified to at a previous hearing on defendant's motion to suppress.

When Stroud requested the registration certificate, the driver was unable to produce it. Stroud then asked defendant for identification, reasoning that there was a possibility the car was stolen because there was no registration and no owner present. After initially denying that she had any identification, defendant told Stroud her name and birthdate.

Stating that he would be right back and expecting the driver and defendant to remain, Stroud returned to his vehicle and ran license checks on the two, determining that the driver was driving on a suspended license and that defendant had several outstanding warrants. He did not, however, inquire as to whether the car was stolen, nor did he know of any reports of stolen cars matching that car's description. He then wrote a citation on the driver and requested a backup police officer.

When defendant was informed that she was being arrested for outstanding warrants, she exited the vehicle, holding a backpack which had the name "Karen" on it. Defendant initially denied that the backpack belonged to her, but later admitted that it was hers. Incident to her arrest, the bag was searched and was found to contain amphetamines, drug paraphernalia and defendant's Utah identification.

Defendant's version of the sequence of events varies from Stroud's. She testified that after Stroud received the driver's license, he asked defendant if she had any identification. She said that she did not. He told them to wait, that he would be right back, and returned to his vehicle for five or ten minutes, long enough for her to smoke a cigarette or two. When he returned, he asked for the registration certificate. When it could not be produced, Stroud asked defendant to return to his vehicle with him, where, at his request, she gave him her name and birthdate. He then sent her back to the other car. Fifteen minutes later, he came back to their car, gave the driver a citation, took defendant out of the car, frisked and handcuffed her, and put her in the front seat of the sheriff's car. She had possession of her bag at this time. Defendant stated that she gave Stroud her name and birthdate because she was required to do so, and did not believe that she could leave.

The issues on appeal are: (1) whether defendant may raise, for the first time on appeal, the argument that state law and article 1 section 14 of the Utah Constitution provide greater protection than the fourth amendment of the United States Constitution against unreasonable search and seizure; (2) whether defendant, a passenger in a motor vehicle, was seized within the meaning of the fourth amendment; and (3) if there was a seizure, whether it was reasonable.

In considering the trial court's action in denying defendant's motion to suppress, we will not disturb its factual evaluation unless its findings are clearly erroneous. *State v. Walker*, 743 P.2d 191, 193 (Utah 1987). The trial judge is in the best position to assess the credibility and accuracy of the witnesses' divergent testimonies. *State v. Arroyo*, 770 P.2d 153, 154–156, (Utah Ct.App.1989); *State v. Sierra*, 754 P.2d 972, 974 (Utah Ct.App.1988). However, in assessing the trial court's legal conclusions based upon its factual findings, we afford it no deference but apply a "correction of error" standard. *Oates v. Chavez*, 749 P.2d 658, 659 (Utah 1988).

UTAH CONSTITUTIONAL ISSUE

[1] Defendant claims that her detention violated the fourth amendment of the United States Constitution and article 1, section 14 of the Utah Constitution. She also argues that the legislative intent behind Utah Code Ann. § 77-7-15 (1980) was to provide greater protection against unreasonable searches and seizures than is provided by the fourth amendment, and that her seizure violated the provisions of both constitutions.[2] However, defendant failed to

2. Utah has never drawn any distinctions between these two provisions and has "always considered the protections afforded to be one and the same." *State v. Watts*, 750 P.2d 1219, 1221 (Utah 1988). However, in a footnote comment, the court indicated that it has not ruled out the possibility of making such a distinction in a future case. *Id.* at n. 8.

brief or argue these issues at the trial level and first raised her statutory argument in her appellate brief. Nominally alluding to such different constitutional guarantees without any analysis before the trial court does not sufficiently raise the issue to permit consideration by this court on appeal. *James v. Preston*, 746 P.2d 799, 801 (Utah Ct.App.1987). "[W]here a defendant fails to assert a particular ground for suppressing unlawfully obtained evidence in the trial court, an appellate court will not consider that ground on appeal.... [M]otions to suppress should be supported by precise averments, not conclusory allegations...." *State v. Carter*, 707 P.2d 656, 660–61 (Utah 1985). Also, in *State v. Lee*, 633 P.2d 48, 53 (Utah 1981), the supreme court stated:

> There is nothing in the record to indicate that the point now urged upon this Court was unavailable or unknown to defendant at the time he filed his motion to suppress, and to entertain the point now would be to sanction the practice of withholding positions that should properly be presented to the trial court but which may be withheld for the purpose of seeking a reversal on appeal and a new trial or dismissal.

We, therefore, decline to consider this argument on appeal.

SEIZURE

[2] Defendant avers that she was seized within the meaning of the fourth amendment because she felt that she was not free to leave when Stroud told her to wait while he returned to his vehicle to check on the driver's license and to run a warrants check on defendant. "A seizure within the meaning of the fourth amendment occurs only when the officer by means of physical force or show of authority has in some way restricted the liberty of a person." *State v. Trujillo*, 739 P.2d 85, 87 (Utah Ct.App.1987). Further, "[w]hen a reasonable person, based on the totality of the circumstances, remains, not in the spirit of cooperation ... but because he believes he is not free to leave," a seizure occurs. *Id.; see also United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980). Defendant was, therefore, seized when Stroud took her name and birthdate and expected her to wait while he ran a warrants check. Under the totality of the circumstances, defendant was reasonably justified in her belief that she was not free to go.

[3] Now, the concern is whether the seizure was reasonable and permissible under the fourth amendment. In *State v. Deitman*, 739 P.2d 616 (Utah 1987) (per curiam), the Utah Supreme Court adopted the reasoning in *United States v. Merritt*, 736 F.2d 223, 230 (5th Cir.1984), wherein the Fifth Circuit specified three constitutionally permissible levels of police stops:

> (1) an officer may approach a citizen at anytime [sic] and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"; (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed.

Deitman, 739 P.2d at 617–18.

We conclude that the present case involves a "level two" stop. Thus, to justify the seizure, Stroud had to have a reasonable "articulable suspicion" that defendant had committed a crime. To determine if he acted reasonably under the circumstances, "due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry v. Ohio*, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed.2d 889 (1968).

At this point, we defer to the findings of the trial judge because of his preferred position in evaluating the witnesses' credibility. *See Arroyo*, at 154–156. The record indicates that the trial court believed Stroud's testimony in concluding there was an articulable suspicion that defendant had committed a crime. Prior to asking defendant for identification, Stroud believed that there was a possibility the car was stolen because the owner was absent and there was no registration. He knew that the driver was not the owner, but determined that it was reasonable to ask defendant her name to determine if it corresponded with the owner's name he had learned prior to stopping the vehicle. The fact that Stroud initially chose to do a warrants check instead of a stolen vehicle check is of no great significance because not all stolen cars are reported immediately. The trial judge stated that where there is a legitimate traffic stop, the driver has a suspended license, and there is "no way of telling who the owner of the vehicle is and whether they have permission to drive it because the owner is not present," a reasonable officer would inquire regarding the identity of a passenger. In weighing the testimony, the court was justified in finding that the amount of time defendant was required to wait, even though a passenger, was reasonable and did not take any longer than a normal traffic stop.

Thus, there was substantial evidence for the trial court to find as it did. Although a seizure occurred, it conformed to constitutional requirements in that Officer Stroud had a reasonable articulable suspicion that the car could have been stolen, and defendant was not detained for an unreasonable period of time. We, therefore, affirm defendant's conviction.

DAVIDSON, J., concurs.

ORME, Judge (dissenting):

Although the legal analysis applicable to this case is ably set out in the majority's opinion, I cannot agree with their ultimate conclusion that the arresting officer had an articulable suspicion that the automobile had been stolen, much less that defendant had in any way participated in the theft.

The only facts relied on by the officer were that the driver's name was not the name of the registered owner and the driver was not able to locate the registration certificate. These facts are just as consistent with the more likely scenario that the driver borrowed the car from its rightful owner. Absent more—and this is all the officer pointed to—there was simply no articulable suspicion, as a matter of law, that the car had been stolen.

I would accordingly reverse.

Tab T

Robert Kent HILL, individually and as Personal Representative of the heirs of Tamara Elaine Hill, deceased, and Lorin Dean Caldwell, individually and as personal representative of the heirs of Troy Neil Caldwell, deceased, Plaintiffs and Appellants,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant, Third-Party Plaintiff-Appellee and Cross-Appellant,

v.

Kenneth Paul BRYAN, Third-Party Defendant and Cross-Appellee.

Nos. 20335, 20391.

Supreme Court of Utah.

Nov. 1, 1988.

Subsequent to settlement of wrongful death action, personal representatives of persons killed in accident filed suit against automobile insurer. Insurer filed third-party claim against driver of second automobile. The District Court, Salt Lake County, Judith M. Billings, J., granted summary judgment for automobile insurer on issue of subrogation and denied insurer's summary judgment motion against driver of second automobile. Personal representatives and insurer appealed. The Supreme Court, Durham, J., held that: (1) in determining allocation of amount received by insured from third-party tort-feasor for subrogation purposes, it is not assumed that the amount of the settlement is coextensive with the amount of damages incurred; (2) in absence of specific contractual terms in either the release and settlement or the insurance policy, the insured must be made whole prior to any recovery by insurer against the tort-feasor; and (3) where personal representatives released driver of second automobile from further liability in order to obtain settlement, insurer's only recourse was to show either that the personal representatives were fully compensated or that personal representatives' action in releasing second driver breached the insurance policy.

Affirmed in part, reversed in part.

See also 709 P.2d 257.

1. Appeal and Error ⇐934(1)

In reviewing grant of motion for summary judgment, all doubts or uncertainties concerning issues of fact are viewed in light most favorable to party opposing summary judgment.

2. Subrogation ⇐1

Subrogation is equitable doctrine and is governed by equitable principles.

3. Insurance ⇐601

In absence of express terms to the contrary, insured must be made whole before the insurer is entitled to be reimbursed from a recovery from the third-party tort-feasor.

4. Insurance ⇐606(1)

Where court record did not reveal extent of subrogation terms of automobile policy and it was not possible to ascertain intent of parties as to extent of their respective rights under the subrogation clause, the doctrine of subrogation would be applied according to general principles of equity.

5. Insurance ⇐606(10)

Where personal representatives of motorists killed in accident released driver of second automobile from further liability in order to obtain settlement with insurer of second automobile, they were not entitled to receive future compensation from driver of second automobile; thus, insurer of first automobile could only be reimbursed from personal representatives of persons killed in the accident and had no claim on driver of second automobile.

6. Insurance ⇐601

In determining allocation of amount received by insured from third-party tort-feasor in order to determine insurer's right to subrogation, it is not assumed that the amount of the settlement is coextensive with the amount of damages incurred.

7. Judgment ⇐181(23)

Where amount of damages suffered by insured was disputed by insured and insurer, summary judgment on automobile insurer's subrogation claim was not appropriate.

8. Insurance ⇐601

If plaintiffs' action in releasing tort-feasor breaches insurance policy and insurer can show it could have recovered from tort-feasor, it will be entitled to proceeds as a matter of equity.

Wallace R. Lauchnor, Salt Lake City, for Robert Kent Hill and Lorin Dean Caldwell.

Glenn C. Hanni, R. Scott Williams, Salt Lake City, for State Farm Mut. Auto. Ins. Co.

J. Anthony Eyre, Heinz J. Mahler, Salt Lake City, for Kenneth Paul Bryan.

DURHAM, Justice:

Plaintiffs appeal the trial court's grant of summary judgment in favor of defendant, arguing that numerous triable issues of fact exist and claiming bad faith. State Farm appeals from a judgment in favor of third-party defendant Bryan. We reverse the judgment against plaintiffs and affirm the judgment against State Farm.

On June 6, 1982, an automobile owned and driven by Kenneth Paul Bryan, who was legally intoxicated, ran a red light and struck a vehicle owned by plaintiff Lorin Caldwell and driven by Caldwell's son. Plaintiff Robert Hill's daughter was an occupant in Caldwell's vehicle. The force of the impact was fatal to both Caldwell's son and Hill's daughter. At the time of the accident, Caldwell's vehicle was insured by State Farm; Bryan's vehicle was insured by Cumis Insurance International. State Farm paid $5,510 to Caldwell for property damage to his vehicle. Shortly thereafter, Cumis offered to tender the policy limits of $50,000 on Bryan's policy to plaintiffs in an attempt to satisfy plaintiffs' claims. State Farm thereupon notified Cumis of its subrogation claim for the amount it had paid Caldwell for property damage.

Both plaintiffs contacted attorneys, who filed separate suits against Bryan and independently investigated the extent of his financial holdings. These investigations revealed that, aside from the Cumis policy, Bryan was insolvent. After this discovery, Caldwell and Hill withdrew their suits against Bryan and made a claim with Cumis for the policy proceeds, which were to be divided evenly between them. Cumis refused to simply deliver one-half to each plaintiff because of State Farm's subrogation claim. Plaintiffs therefore sought a waiver of claim from State Farm, arguing that the value of their wrongful death actions far exceeded Bryan's policy limits. State Farm refused to waive its subrogation claim and apparently urged plaintiffs to litigate their suits against Bryan so that the amount of their damages could be judicially ascertained. Plaintiffs determined the cost of acquiring such a judicial determination to be prohibitive.

Plaintiffs signed separate releases of claims in favor of Bryan, Cumis, and other possible defendants. In return, Cumis tendered $22,245 to Hill and $27,755 to Caldwell.[1]

Because Cumis refused to proffer policy proceeds unless State Farm's subrogation interest was accounted for, its tender to Caldwell consisted of a check for $22,245 made to Caldwell alone and a check for $5,510 made jointly to Caldwell and State Farm. The latter draft corresponded to the amount of property damage incurred by Caldwell and accounted for State Farm's subrogation claim. The release signed by Caldwell recognized the dispute surrounding the $5,510 by stating:

> [A] controversy exists between State Farm Mutual Insurance Company and Lorin D. Caldwell as to who is entitled to the said amount, and that the matter will be resolved between the two or by pay-

1. To arrive at these figures, the parties subtracted the property damage amount from the total policy proceeds and divided the remainder equally between them. The disputed property damage award was then added to Caldwell's portion because he was the owner of the damaged automobile.

ment into court or by judicial determination.

Plaintiffs and State Farm failed to reach an accord for more than one year after the release was signed. Plaintiffs filed suit against State Farm, seeking payment of $5,510 and alleging bad faith on behalf of State Farm for its refusal to waive the subrogation claim. In turn, State Farm filed a third-party claim against Bryan for subrogation and indemnity. State Farm also counterclaimed against plaintiffs for $5,510.

State Farm filed a motion for summary judgment on both plaintiffs' complaints and on its own counterclaim. The trial court granted the motion, awarding State Farm $5,510, interest, and attorney fees. The court also decreed that State Farm had no cause of action against Bryan.

[1] In reviewing a grant of a motion for summary judgment, all doubts or uncertainties concerning issues of fact are viewed in the light most favorable to the party opposing summary judgment. *Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles*, 681 P.2d 1258, 1261 (Utah 1984). Where a triable issue of fact exists, the cause will be remanded for determination of that issue.

Defendant State Farm asserts that it is subrogated to the rights of plaintiffs and that State Farm should thereby recover the amount it paid for property damage from the amount plaintiffs recovered from the third-party tort-feasor. Plaintiffs argue that State Farm's subrogation rights do not arise until plaintiffs have been made whole.

[2, 3] Subrogation is an equitable doctrine and is governed by equitable principles. This doctrine can be modified by contract, but in the absence of express terms to the contrary, the insured must be made whole before the insurer is entitled to be reimbursed from a recovery from the third-party tort-feasor. *Lyon v. Hartford Accident & Indem. Co.*, 25 Utah 2d 311, 318, 480 P.2d 739, 744 (1971). Noncontractual subrogation rights will only be enforced on behalf of a party maintaining a superior equitable position, and the insurer's equitable position cannot be superior to the insured's unless the insured has been completely compensated. *Transamerica Ins. Co. v. Barnes*, 29 Utah 2d 101, 505 P.2d 783 (1972); *see also Culver v. Insurance Co. of N. Am.*, 221 N.J. Super. 493, 535 A.2d 15 (1987); *Westendorf v. Stasson*, 330 N.W.2d 699 (Minn.1983).

When the amount of damages incurred by the insured has been judicially ascertained, the extent of the subrogation right of the insurer is usually undisputed. The insured is not entitled to double recovery, and the insurer is equitably entitled to recover any amounts from the insured that the insured recovered from the tort-feasor.

When the insured settles with the tort-feasor before the amount of damages has been judicially determined, it is more difficult to ascertain whether the insurer is entitled to recover all or any of the amount paid on the policy to the insured. *See generally* Comment, *Subrogation in Pennsylvania—Competing Interests of Insurers and Insureds in Settlements with Third-Party Tort Feasors*, 56 Temp. L.Q. 667 (1983).

In *Transamerica Insurance Co. v. Barnes*, 29 Utah 2d 101, 505 P.2d 783 (1972), this Court examined an insurance company's claim for subrogation against its insured where the insured had settled with a third-party tort-feasor. The insurance company asserted that the settlement covered the insured's entire claim and that the insurance company was therefore entitled to receive reimbursement for the medical expenses it had paid the insured. In revising the summary judgment, this Court noted that a lump-sum settlement without apportionment as to specific items of damage is not sufficient to indicate whether the insured had received double compensation for the same injury. *Id.* 29 Utah 2d at 106, 505 P.2d at 786. In order to ascertain what the settlement in *Barnes* was intended to cover, this Court reversed and remanded the cause for a trial. *Id.* 29 Utah 2d at 107, 505 P.2d at 787.

Setting forth the purpose and intended allocation of money given in the settlement

is a simple matter. As this Court noted in *Barnes*, to the extent a negotiated settlement was intended to include damages previously paid to the insured by the insurer, the tort-feasor who is aware of the insurer's subrogation claim should offer payment in two drafts: one draft for the insured alone and a separate draft issued to the insured and the insurer jointly. *Id.* 29 Utah 2d at 106, 505 P.2d at 787. In so doing, the apportionment of the settlement amount is clearly shown and the intentions of the parties can most effectively be enforced.

[4] In the case now before the Court, the insurer's right to subrogation was set forth in the insurance policy. Unfortunately, the record does not reveal the extent of the subrogation terms, nor does it provide a complete copy of the insurance policy. We are thus unable to ascertain the intent of the parties as to the extent of their respective rights under the subrogation clause. Therefore, the doctrine of subrogation should be applied in this case according to general principles of equity.

As suggested in *Barnes*, Cumis prepared two separate drafts when tendering payment to Caldwell under the settlement. The first draft was to Caldwell alone and the second draft, in the amount of $5,510, was made to Caldwell and State Farm. State Farm now argues that the joint draft was intended by plaintiffs and Bryan to cover plaintiffs' property damage. This contention is incorrect. The language of the release does not provide for the allocation of the $5,510. The release states that the parties have yet to determine the rightful owner of that amount because "a controversy exists" between State Farm and Caldwell "as to who was entitled to the said amount, and that the matter will be resolved between the two or by payment into court or by judicial determination." In other words, at the time the draft was conveyed to State Farm and Caldwell, the parties had not agreed whether that amount was intended for property damage or to satisfy the wrongful death claim. Cumis acted properly in acknowledging State Farm's subrogation claim and in being certain that, to the extent State Farm was justified in taking reimbursement from Cumis's policy limits, it would be able to do so. Nonetheless, the plain language of the release shows that neither Cumis nor plaintiffs intended the amount to be allocated to property damage without further negotiation.

[5] Because the parties have been unable to resolve the subrogation question, we are required to determine who is entitled to the settlement proceeds. State Farm argues that the amount recovered by plaintiffs from Cumis represents the entire amount of plaintiffs' damages. Plaintiffs, on the other hand, argue that the amount received from Cumis only compensates them for a portion of their damages and therefore they are not obligated to reimburse State Farm until they receive a full recovery. Since plaintiffs released Bryan from further liability in order to obtain the settlement with Cumis, they are not entitled to receive future compensation from Bryan. Thus, State Farm can only be reimbursed from plaintiffs and has no claim on Bryan. *See* 73 Am. Jur.2d *Subrogation* § 106 (subrogee's rights are subject to limitations placed on the rights of subrogor).

[6] In determining the allocation of an amount received by an insured from a third-party tort-feasor, we do not assume that the amount of the settlement is coextensive with the amount of damages incurred. Damages encompass the injuries suffered by a plaintiff. The amount of a settlement almost universally reflects the greatest amount that a plaintiff could have possibly received from a tort-feasor without litigation. As the court in *Janzen v. Land O'Lakes, Inc.*, 278 N.W.2d 67 (Minn. 1979), stated:

> [M]any considerations enter into settlements. Respondent may have wished to avoid possibly protracted and frustrating legal battles; respondent may have needed the money immediately; or respondent may have been pressured into the agreement for other reasons. Thus, the amount of the settlement and compensation may not adequately reflect the actual loss....

Id. at 70; *see also Cooper v. Younkin*, 339 N.W.2d 552, 554 (Minn.1983); *Florida Farm Bureau Ins. Co. v. Martin*, 377 So.2d 827, 830–31 (Fla.1979).

One of the considerations which may lead an insured to settle with a third-party tort-feasor for an amount less than its damages is that the tort-feasor is insolvent and less than adequately insured. Here, Bryan was personally insolvent, and his insurance policy was for an amount apparently insufficient to cover the full extent of plaintiffs' claims.[2]

Several courts have noted the importance of a tort-feasor's solvency or adequacy of insurance in influencing the insured's decision to settle and will not allow an insurer to exercise a subrogation claim where the settlement was reached due to the tort-feasor's inability to fully compensate the insured. *See, e.g., Government Employees Ins. Co. v. Graff*, 327 So.2d 88, 91 (Fla. 1976); *Cooper*, 339 N.W.2d at 554.

In light of these principles and prevailing Utah law, we hold that in the absence of specific contractual terms in either the release and settlement or the insurance policy, the insured must be made whole prior to any recovery by the insurer against the tort-feasor. Where the insured settles with the tort-feasor, the settlement amount goes to the insured unless the insurer can prove that the insured has already received full compensation.

Our holding does not undermine the suggestion in *Barnes* that a settlement agreement can effectively allocate the damages it is intended to cover through the use of multiple drafts made out to appropriate parties. Instead, where the language of the release leaves the allocation uncertain and where there is no controlling contractual language to the contrary, the insured should be given the benefit of the doubt as to its damages and the burden will rest with the insurer to prove that the insured has been fully compensated. This procedure has been used by other courts and will result in the most effective implementation of the equitable principles underlying the doctrine of subrogation. *See, e.g., Automobile Ins. Co. of Hartford v. Conlon*, 153 Conn. 415, 216 A.2d 828 (1966); *Dimick ex rel. Dimick v. Lewis*, 127 N.H. 141, 497 A.2d 1221 (1985).

[7] In the instant case, the amount of plaintiffs' damages is a question of fact which has yet to be determined. There is no specific contractual language in the insurance policy which requires allocation of the settlement amount, nor does the release specify who should receive the $5,510 paid jointly to State Farm and Caldwell. Because the amount of plaintiffs' damages is disputed by the parties, that amount should be set through judicial determination so that the proceeds from Bryan's policy can be equitably distributed. That judicial determination will be factually based, and therefore summary judgment was inappropriate in this case.

State Farm also claims that if it is not entitled to the $5,510 payment from Bryan's insurer, then the releases signed by Hill and Caldwell cannot act to extinguish its subrogation claim against Bryan. Allowing plaintiffs to extinguish State Farm's claims would be tantamount to a breach of the subrogation provision in the insurance policy. If, however, the amount of damages incurred by plaintiffs exceeds the amount paid by Bryan, then State Farm must also demonstrate that it could have recovered the $5,510 from Bryan, absent the releases and without relying on the insurance policy proceeds. *See, e.g., Royal Indem. Co. v. Pharr*, 94 Ga. App. 114, 117, 93 S.E.2d 784, 786 (1956). As we stated in *Barnes:*

> The plaintiff [insurer] to establish a superior equity and thus to be entitled to prevail must present proof which establishes that the damages covered by defendant's settlement were the same or cover those for which the defendant has already received indemnity from plaintiff; otherwise, the receipt of payment from the tort-feasor does not entitle the plaintiff to the return of the payments made by it.

2. This is evidenced by Cumis's willingness to tender the full policy amount prior to litigation or serious negotiation over the amount of plaintiffs' damages.

Barnes, 29 Utah 2d 101, 106–07, 505 P.2d 783, 787 (citations omitted).

[8] We affirm the trial court's summary judgment in State Farm's claim against Bryan. State Farm's subrogation claims cannot rise above the claims of the subrogees, plaintiffs Hill and Caldwell. Because Hill and Caldwell released Bryan from any further liability, State Farm is unable to pursue its claim against him. Instead, as explained above, State Farm's only recourse is to show either that plaintiffs were fully compensated and thus State Farm is entitled to be reimbursed from Bryan's insurance policy proceeds or that plaintiffs' action in releasing Bryan breached the insurance policy, and if State Farm shows it could have recovered from Bryan, it will be entitled to the proceeds as a matter of equity.

Summary judgment in favor of State Farm on plaintiffs' complaints and on State Farm's counterclaim is reversed. Judgment in favor of Bryan is affirmed.

HALL, C.J., HOWE, Associate C.J., and STEWART and ZIMMERMAN, JJ.

Lori CRUZ and Nicholas A. Cruz, Plaintiffs and Appellants,

v.

Jed WRIGHT, Defendant and Appellee.

No. 20465.

Supreme Court of Utah.

Nov. 2, 1988.

Husband sued negligent driver to recover damages for injuries sustained in an automobile accident, and wife sued driver to recover for loss of consortium. The District Court, Fourth District, Utah County, Cullen Y. Christensen, J., granted defendant's motion to dismiss the loss-of-consortium claim, and wife appealed. The Supreme Court, Zimmerman, J., held that the constitutional open courts provision did not prohibit abolishment of a common law loss-of-consortium cause of action.

Affirmed.

1. Constitutional Law ⇐328

Open courts provision of constitution is not to be read as preserving every common law cause of action that may have existed prior to adoption of constitution. Const. Art. 1, § 11.

2. Husband and Wife ⇐209(3, 4)

Even if loss-of-consortium cause of action did exist at common law, such cause of action was abolished by adoption of Married Women's Act of 1898. U.C.A.1953, 30–2–1 et seq., 30–2–4.

Samuel King, Jeffrey O. Burkhardt, Salt Lake City, for plaintiffs and appellants.

D. Gary Christian, Gregory J. Sanders, Salt Lake City, for defendant and appellee.

ZIMMERMAN, Justice:

Plaintiff Lori Cruz appeals from the trial court's dismissal of her claim for loss of consortium arising out of injuries suffered by her husband in an automobile accident caused by defendant Jed Wright. Her primary argument on appeal is that article I, section 11 of the Utah Constitution—the open courts provision—prevented the legislature from abolishing the husband's common law cause of action for loss of consortium and that we should extend a parallel cause of action to the wife. We adhere to our prior decisions and hold that in passing the Married Women's Act of 1898, the legislature eliminated the common law loss-of-consortium cause of action. We further hold that the 1898 Act did not run afoul of article I, section 11.

Following an automobile accident in which Nicholas Cruz was injured, Nicholas and his wife, Lori, filed an action against the driver of the other car, Jed Wright, alleging that Nicholas was injured as a

IN THE SUPREME COURT OF THE STATE OF UTAH

----ooOoo----

Robert Kent Hill, individually and as personal representative of the heirs of Tamara Elaine Hill, deceased, and Lorin Dean Caldwell, individually and as personal representative of the heirs of Troy Neil Caldwell, deceased,
Plaintiffs and Appellants,

v.

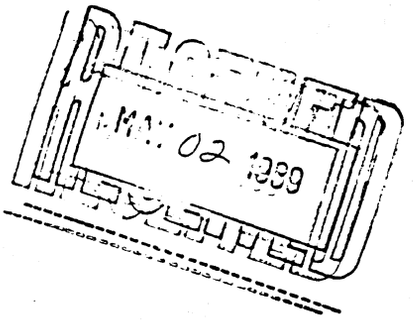
State Farm Mutual Automobile Insurance Company,
Defendant, Third-Party Plaintiff-Appellee and Cross-Appellant,

v.

Kenneth Paul Bryan,
Third-Party Defendant and Cross-Appellee.

Nos. 20335, 20391

F I L E D
November 1, 1988



Geoffrey J. Butler, Clerk

Third District, Salt Lake County
The Honorable Judith M. Billings

Attorneys: Wallace R. Lauchnor, Salt Lake City, for Robert Kent Hill and Lorin Dean Caldwell
Glenn C. Hanni, R. Scott Williams, Salt Lake City, for State Farm Mutual Automobile Insurance Company
J. Anthony Eyre, Heinz J. Mahler, Salt Lake City, for Kenneth Paul Bryan

---

DURHAM, Justice:

Plaintiffs appeal the trial court's grant of summary judgment in favor of defendant, arguing that numerous triable issues of fact exist and claiming bad faith. State Farm appeals from a judgment in favor of third-party defendant Bryan. We reverse the judgment against plaintiffs and affirm the judgment against State Farm.

On June 6, 1982, an automobile owned and driven by Kenneth Paul Bryan, who was legally intoxicated, ran a red light and struck a vehicle owned by plaintiff Lorin Caldwell

and driven by Caldwell's son. Plaintiff Robert Hill's daughter was an occupant in Caldwell's vehicle. The force of the impact was fatal to both Caldwell's son and Hill's daughter. At the time of the accident, Caldwell's vehicle was insured by State Farm; Bryan's vehicle was insured by Cumis Insurance International. State Farm paid $5,510 to Caldwell for property damage to his vehicle. Shortly, thereafter, Cumis offered to tender the policy limits of $50,000 on Bryan's policy to plaintiffs in an attempt to satisfy plaintiffs' claims. State Farm thereupon notified Cumis of its subrogation claim for the amount it had paid Caldwell for property damage.

Both plaintiffs contacted attorneys, who filed separate suits against Bryan and independently investigated the extent of his financial holdings. These investigations revealed that, aside from the Cumis policy, Bryan was insolvent. After this discovery, Caldwell and Hill withdrew their suits against Bryan and made a claim with Cumis for the policy proceeds, which were to be divided evenly between them. Cumis refused to simply deliver one-half to each plaintiff because of State Farm's subrogation claim. Plaintiffs therefore sought a waiver of claim from State Farm, arguing that the value of their wrongful death actions far exceeded Bryan's policy limits. State Farm refused to waive its subrogation claim and apparently urged plaintiffs to litigate their suits against Bryan so that the amount of their damages could be judicially ascertained. Plaintiffs determined the cost of acquiring such a judicial determination to be prohibitive.

Plaintiffs signed separate releases of claims in favor of Bryan, Cumis, and other possible defendants. In return, Cumis tendered $22,245 to Hill and $27,755 to Caldwell.[1]

Because Cumis refused to proffer policy proceeds unless State Farm's subrogation interest was accounted for, its tender to Caldwell consisted of a check for $22,245 made to Caldwell alone and a check for $5,510 made jointly to Caldwell and State Farm. The latter draft corresponded to the amount of property damage incurred by Caldwell and accounted for State Farm's subrogation claim. The release signed by Caldwell recognized the dispute surrounding the $5,510 by stating:

---

1. To arrive at these figures, the parties subtracted the property damage amount from the total policy proceeds and divided the remainder equally between them. The disputed property damage award was then added to Caldwell's portion because he was the owner of the damaged automobile.

> [A] controversy exists between State Farm Mutual Insurance Company and Lorin D. Caldwell as to who is entitled to the said amount, and that the matter will be resolved between the two or by payment into court or by judicial determination.

Plaintiffs and State Farm failed to reach an accord for more than one year after the release was signed. Plaintiffs filed suit against State Farm, seeking payment of $5,510 and alleging bad faith on behalf of State Farm for its refusal to waive the subrogation claim. In turn, State Farm filed a third-party claim against Bryan for subrogation and indemnity. State Farm also counterclaimed against plaintiffs for $5,510.

State Farm filed a motion for summary judgment on both plaintiffs' complaints and on its own counterclaim. The trial court granted the motion, awarding State Farm $5,510, interest, and attorney fees. The court also decreed that State Farm had no cause of action against Bryan.

In reviewing a grant of a motion for summary judgment, all doubts or uncertainties concerning issues of fact are viewed in the light most favorable to the party opposing summary judgment. Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, 681 P.2d 1258, 1261 (Utah 1984). Where a triable issue of fact exists, the cause will be remanded for determination of that issue.

Defendant State Farm asserts that it is subrogated to the rights of plaintiffs and that State Farm should thereby recover the amount it paid for property damage from the amount plaintiffs recovered from the third-party tort-feasor. Plaintiffs argue that State Farm's subrogation rights do not arise until plaintiffs have been made whole.

Subrogation is an equitable doctrine and is governed by equitable principles. This doctrine can be modified by contract, but in the absence of express terms to the contrary, the insured must be made whole before the insurer is entitled to be reimbursed from a recovery from the third-party tort-feasor. Lyon v. Hartford Accident & Indem. Co., 25 Utah 2d 311, 318, 480 P.2d 739, 744 (1971). Noncontractual subrogation rights will only be enforced on behalf of a party maintaining a superior equitable position, and the insurer's equitable position cannot be superior to the insured's unless the insured has been completely compensated. Transamerica Ins. Co. v. Barnes, 29 Utah 2d 101, 505 P.2d 783 (1972); see also Culver v. Insurance Co. of N. Am., 221 N.J. Super. 493, 535 A.2d 15, (1987); Westendorf v. Stasson, 330 N.W.2d 699 (Minn. 1983).

When the amount of damages incurred by the insured has been judicially ascertained, the extent of the subrogation right of the insurer is usually undisputed. The insured is not entitled to double recovery, and the insurer is equitably entitled to recover any amounts from the insured that the insured recovered from the tort-feasor.

When the insured settles with the tort-feasor before the amount of damages has been judicially determined, it is more difficult to ascertain whether the insurer is entitled to recover all or any of the amount paid on the policy to the insured. See generally Comment, Subrogation in Pennsylvania--Competing Interests of Insurers and Insureds in Settlements with Third-Party Tort Feasors, 56 Temp. L.Q. 667 (1983).

In Transamerica Insurance Co. v. Barnes, 29 Utah 2d 101, 505 P.2d 783 (1972), this Court examined an insurance company's claim for subrogation against its insured where the insured had settled with a third-party tort-feasor. The insurance company asserted that the settlement covered the insured's entire claim and that the insurance company was therefore entitled to receive reimbursement for the medical expenses it had paid the insured. In revising the summary judgment, this Court noted that a lump-sum settlement without apportionment as to specific items of damage is not sufficient to indicate whether the insured had received double compensation for the same injury. Id. at 106, 505 P.2d at 786. In order to ascertain what the settlement in Barnes was intended to cover, this Court reversed and remanded the cause for a trial. Id. at 107, 505 P.2d at 787.

Setting forth the purpose and intended allocation of money given in the settlement is a simple matter. As this Court noted in Barnes, to the extent a negotiated settlement was intended to include damages previously paid to the insured by the insurer, the tort-feasor who is aware of the insurer's subrogation claim should offer payment in two drafts: one draft for the insured alone and a separate draft issued to the insured and the insurer jointly. Id. at 106, 505 P.2d at 787. In so doing, the apportionment of the settlement amount is clearly shown and the intentions of the parties can most effectively be enforced.

In the case now before the Court, the insurer's right to subrogation was set forth in the insurance policy. Unfortunately, the record does not reveal the extent of the subrogation terms, nor does it provide a complete copy of the insurance policy. We are thus unable to ascertain the intent of the parties as to the extent of their respective rights under the subrogation clause. Therefore, the doctrine of subrogation should be applied in this case according to general principles of equity.

As suggested in Barnes, Cumis prepared two separate drafts when tendering payment to Caldwell under the settlement. The first draft was to Caldwell alone and the second draft, in the amount of $5,510, was made to Caldwell and State Farm. State Farm now argues that the joint draft was intended by plaintiffs and Bryan to cover plaintiffs' property damage. This contention is incorrect. The language of the release does not provide for the allocation of the $5,510. The release states that the parties have yet to determine the rightful owner of that amount because "a controversy exists" between State Farm and Caldwell "as to who was entitled to the said amount, and that the matter will be resolved between the two or by payment into court or by judicial determination." In other words, at the time the draft was conveyed to State Farm and Caldwell, the parties had not agreed whether that amount was intended for property damage or to satisfy the wrongful death claim. Cumis acted properly in ackowledging State Farm's subrogation claim and in being certain that, to the extent State Farm was justified in taking reimbursement from Cumis's policy limits, it would be able to do so. Nonetheless, the plain language of the release shows that neither Cumis nor plaintiffs intended the amount to be allocated to property damage without further negotiation.

Because the parties have been unable to resolve the subrogation question, we are required to determine who is entitled to the settlement proceeds. State Farm argues that the amount recovered by plaintiffs from Cumis represents the entire amount of plaintiffs' damages. Plaintiffs, on the other hand, argue that the amount received from Cumis only compensates them for a portion of their damages and therefore they are not obligated to reimburse State Farm until they receive a full recovery. Since plaintiffs released Bryan from further liability in order to obtain the settlement with Cumis, they are not entitled to receive future compensation from Bryan. Thus, State Farm can only be reimbursed from plaintiffs and has no claim on Bryan. See 73 Am. Jur. 2d Subrogation § 106 (subrogee's rights are subject to limitations placed on the rights of subrogor).

In determining the allocation of an amount received by an insured from a third-party tort-feasor, we do not assume that the amount of the settlement is coextensive with the amount of damages incurred. Damages encompass the injuries suffered by a plaintiff. The amount of a settlement almost universally reflects the greatest amount that a plaintiff could have possibly received from a tort-feasor without litigation. As the court in Janzen v. Land O'Lakes, Inc., 278 N.W.2d 67 (Minn. 1979), stated:

> [M]any considerations enter into settlements. Respondent may have wished to avoid possibly protracted and frustrating legal battles;

> respondent may have needed the money immediately; or respondent may have been pressured into the agreement for other reasons. Thus, the amount of the settlement and compensation may not adequately reflect the actual loss . . . .

Id. at 70; see also Cooper v. Younkin, 339 N.W.2d 552, 554 (Minn. 1983); Florida Farm Bureau Ins. Co. v. Martin, 377 So. 2d 827, 830-31 (Fla. 1979).

One of the considerations which may lead an insured to settle with a third-party tort-feasor for an amount less than its damages is that the tort-feasor is insolvent and less than adequately insured. Here, Bryan was personally insolvent, and his insurance policy was for an amount apparently insufficient to cover the full extent of plaintiffs' claims.[2]

Several courts have noted the importance of a tort-feasor's solvency or adequacy of insurance in influencing the insured's decision to settle and will not allow an insurer to exercise a subrogation claim where the settlement was reached due to the tort-feasor's inability to fully compensate the insured. See, e.g., Government Employees Ins. Co. v. Graff, 327 So. 2d 88, 91 (Fla. 1976); Cooper, 339 N.W.2d at 554.

In light of these principles and prevailing Utah law, we hold that in the absence of specific contractual terms in either the release and settlement or the insurance policy, the insured must be made whole prior to any recovery by the insurer against the tort-feasor. Where the insured settles with the tort-feasor, the settlement amount goes to the insured unless the insurer can prove that the insured has already received full compensation.

Our holding does not undermine the suggestion in Barnes that a settlement agreement can effectively allocate the damages it is intended to cover through the use of multiple drafts made out to appropriate parties. Instead, where the language of the release leaves the allocation uncertain and where there is no controlling contractual language to the contrary, the insured should be given the benefit of the doubt as to its damages and the burden will rest with the insurer to prove that the insured has been fully compensated. This procedure has been used by other courts and will result in the most effective implementation of the equitable principles underlying the doctrine of subrogation. See, e.g., Automobile

---

2. This is evidenced by Cumis's willingness to tender the full policy amount prior to litigation or serious negotiation over the amount of plaintiffs' damages.

Ins. Co. of Hartford v. Conlon, 216 A.2d 828 (Conn. 1966); Dimick ex rel. Dimick v. Lewis, 497 A.2d 1221 (N.H. 1985).

In the instant case, the amount of plaintiffs' damages is a question of fact which has yet to be determined. There is no specific contractual language in the insurance policy which requires allocation of the settlement amount, nor does the release specify who should receive the $5,510 paid jointly to State Farm and Caldwell. Because the amount of plaintiffs' damages is disputed by the parties, that amount should be set through judicial determination so that the proceeds from Bryan's policy can be equitably distributed. That judicial determination will be factually based, and therefore summary judgment was inappropriate in this case.

State Farm also claims that if it is not entitled to the $5,510 payment from Bryan's insurer, then the releases signed by Hill and Caldwell cannot act to extinguish its subrogation claim against Bryan. Allowing plaintiffs to extinguish State Farm's claims would be tantamount to a breach of the subrogation provision in the insurance policy. If, however, the amount of damages incurred by plaintiffs exceeds the amount paid by Bryan, then State Farm must also demonstrate that it could have recovered the $5,510 from Bryan, absent the releases and without relying on the insurance policy proceeds. See, e.g., Royal Indem. Co. v. Pharr, 94 Ga. App. 114, 117, 93 S.E.2d 784, 786 (1956). As we stated in Barnes:

> The plaintiff [insurer] to establish a superior equity and thus to be entitled to prevail must present proof which establishes that the damages covered by defendant's settlement were the same or cover those for which the defendant has already received indemnity from plaintiff; otherwise, the receipt of payment from the tort-feasor does not entitle the plaintiff to the return of the payments made by it.

Barnes, 29 Utah 2d 101, 106-07, 505 P.2d 783, 787 (citations omitted).

We affirm the trial court's summary judgment in State Farm's claim against Bryan. State Farm's subrogation claims cannot rise above the claims of the subrogees, plaintiffs Hill and Caldwell. Because Hill and Caldwell released Bryan from any further liability, State Farm is unable to pursue its claim against him. Instead, as explained above, State Farm's only recourse is to show either that plaintiffs were fully compensated and thus State Farm is entitled to be reimbursed from Bryan's insurance policy proceeds or that plaintiffs' action in releasing Bryan breached the insurance policy, and

if State Farm shows it could have recovered from Bryan, it will be entitled to the proceeds as a matter of equity.

Summary judgment in favor of State Farm on plaintiffs' complaints and on State Farm's counterclaim is reversed. Judgment in favor of Bryan is affirmed.

WE CONCUR:

Gordon R. Hall, Chief Justice

Richard C. Howe, Associate Chief Justice

I. Daniel Stewart, Justice

Michael D. Zimmerman, Justice

Tab U

ad observed the defendant at close range or a period of some five minutes under xcellent lighting conditions. The defend-nt matched closely the description given y Ricks immediately after the robbery. Vithin eight days after the robbery, Ricks lentified the defendant at the lineup. Cas-erson's identification matched closely that f Ricks. The minute divergence of his escription would certainly not reach a level o as "to give rise to a very substantial ikelihood of irreparable misidentification", Simmons supra, at 384, but would merely go to the weight of the evidence. Manson, upra.

This state has from the beginning aligned tself with the constitutional guidelines set by Stovall and its progeny and it continues o do so today. See *State v. Perry*, 27 Utah 2d 48, 492 P.2d 1349 (1972); *State v. Malm-rose*, Utah, 649 P.2d 56 (1982).

[2] In light of our holding that the out-of-court identification of defendant met in all respects the guidelines set by constitutional requirements and by this Court, we next address the issue of whether the in-court identification of defendant made by Casperson and Ricks should have been suppressed. There was nothing improper about the out-of-court identification to require independent in-court identification of the defendant, although the trial record reveals that that was done.

[3] Both victims compared the appearance of the defendant on the day of the trial with that on the day of the robbery. Both commented upon his dancing gait. Both gave their mnemonic impressions of his demeanor during the holdup and positively identified him as the gunman. Thus, even were we to hold (which we do not) that the out-of-court identification should have been suppressed, the in-court identification was sufficient for the jury to find that the victims' courtroom identification "rested on an independent recollection of [their] encounter with the assailant, uninfluenced by the pre-trial identifications ..." See *United States v. Crews*, 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980).

[4, 5] Whatever divergence existed between Casperson's and Ricks' in- and out-of-court identification had to be weighed and determined by the jury and went to the credibility of the witnesses, not to the issue of admissibility. *State v. Casias*, Utah, 567 P.2d 1097 (1977); *State v. Wilson*, Utah, 565 P.2d 66 (1977). It is not our province to measure conflicting evidence, credibility of witnesses, nor the weight to be given the one or the other. That responsibility belongs strictly to the trier of fact. *State v. Logan*, Utah, 563 P.2d 811 (1977), and the cases cited therein. The evidence before the jury in this case was substantial so that it could have properly arrived at a verdict of guilty beyond a reasonable doubt.

[6] Appellant's argument that there was insufficient evidence to link the drugs found on his person to the robbery at the Prescription Center North pharmacy must be rejected for the same reason as his argument that there was likelihood of misidentification. The jury heard Casperson testify that his pharmacy was missing a bottle of Seconal pills after the robbery. The only other pharmacy from which this bottle could have been taken (Prescription Center pharmacy in a medical center on 25th Street in Ogden) was not missing any Seconal pills. The bottle found on defendant was part of the inventory of missing drugs made by Casperson and Ricks after the robbery. Defendant's argument that it could have been stolen in any one of previous robberies went to the credibility, not to the admissibility of the evidence. Again, "[i]t is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses, and it is not within the prerogative of this Court to substitute its judgment for that of the fact-finder." *State v. Lamm*, Utah, 606 P.2d 229, 231 (1980).

[7, 8] Appellant next contends that evidence of alibi was improperly suppressed in the trial court and that the prosecution and his own attorney entered into a stipulation that certain hearsay evidence given by a witness (now deceased) could not be used at trial. This issue was not raised for determination by the trial court and does not appear in the record. When a defendant predicates error to this Court, he has the duty and responsibility of supporting such allegation by an adequate record. Absent that record, defendant's assignment of error stands as a unilateral allegation which the review court has no power to determine. This Court simply cannot rule on a question which depends for its existence upon alleged facts unsupported by the record. See *State v. Jones* (1982), 657 P.2d 1263, and cases cited therein. See also *McBride v. State*, Alaska, 368 P.2d 925, 929 (1962), cert. denied, 374 U.S. 811, 83 S.Ct. 1702, 10 L.Ed.2d 1035 (1963).

The verdict below is affirmed.

HALL, C.J., and STEWART, OAKS and DURHAM, JJ., concur.

LEIGH FURNITURE AND CARPET COMPANY, Plaintiff, Appellant, and Cross-Respondent,

v.

T. Richard ISOM dba Richard's Fine Furnishings, Defendant, Respondent, and Cross-Appellant.

No. 17264.

Supreme Court of Utah.

Dec. 10, 1982.

Seller of furniture business sued buyer to repossess business, terminate buyer's interest and obtain deficiency judgment, in which buyer counterclaimed for intentional interference with contractual relations. The Fifth District Court, Washington County, Robert F. Owens, Circuit Judge sitting by designation, entered judgment on jury verdict for buyer but reduced punitive damages award, and appeal and cross appeal were taken. The Supreme Court, Oaks, J., held that: (1) Utah recognizes tort of intentional interference with prospective economic relations; (2) although individual interferences by seller with buyer's business might have been justified as an overly zealous attempt to protect seller's contract interest, the actions, cumulatively, crossed the threshold of tortious conduct; (3) where intentional interference was a step toward achieving goal of reselling the building free of buyer's interest the verdict could not be upheld on theory of improper purpose; (4) breach of contract for immediate purpose of injuring the other contracting party satisfies the improper means alternative of the tort; (5) evidence warranted conclusion that seller breached its express and implied contractual duties for purpose of ruining buyer's business and obtaining possession, satisfying the "improper means" alternative; and (6) it was error to reduce punitive damage award to 20 percent of compensatory damages.

Modified as regards punitive damages and affirmed.

Howe, J., filed concurring opinion.

1. Torts ⇐12

One party to a contract cannot be liable for the tort of interference with contract for inducing a breach by himself or the other contracting party.

2. Torts ⇐12

Right of action for interference with a specific contract is but one instance, rather than the total class, of protections against wrongful interference with advantageous economic relations.

3. Appeal and Error ⇐1170.1

Appellant has the burden of demonstrating that any error has affected his substantial rights. Rules Civ.Proc., Rule 61.

4. Appeal and Error ⇐930(1)

Every reasonable presumption is exercised in favor of validity of a general verdict.

5. Trial ⇐330(5)

Where more than one cause of action has been submitted to a jury and where one of those causes of action was error free, supported by substantial evidence, and an appropriate basis for general verdict, the judgment on that verdict will be affirmed, even though the evidence was insufficient to sustain the verdict on one of the other causes of action submitted.

6. Torts ⇐10(1)

Tort of intentional interference with prospective economic relations reaches beyond protection of an interest in an existing contract and protects a party's interest and prospective relationships of economic advantage not yet reduced to a formal contract and perhaps not expected to be.

7. Torts ⇐10(1)

Utah recognizes the tort of intentional interference with prospective economic relations.

8. Torts ⇐26(2)

In an action for tort of intentional interference with prospective economic relations plaintiff must allege and prove more than the prima facie tort but is not required to negate all defenses of privilege, and privilege is an affirmative defense.

9. Torts ⇐26(2)

To recover damages for tort of intentional interference with prospective economic advantage plaintiff must prove that defendant intentionally interfered with plaintiff's existing or potential economic relations, for an improper purpose or by improper means, causing an injury to the plaintiff, and privilege is an affirmative defense which is not an issue unless the acts charged would be tortious on the part of an unprivileged defendant.

10. Torts ⇐28

Instructions were sufficient to permit recovery on theory of tort of interference with prospective economic relations where although they did not expressly require proof of improper purpose or improper means they required proof that challenged action was "without justification" and definition of that term as requiring wrongful or malicious conduct was functional equivalent of improper means or improper purpose and instructions covered the privilege defense.

11. Torts ⇐27

There was sufficient evidence to sustain jury verdict against seller of furniture business for intentional interference with prospective economic relations that caused injury to buyer in that seller intentionally interfered with and caused termination of actual or potential relationships between buyer and customers, suppliers and potential business associates by, among other things, causing customers to leave the store.

12. Torts ⇐10(3)

Driving away an individual's existing or potential customers is the archetypical injury designed to be remedied by cause of action for intentional interference with prospective economic relations.

13. Contracts ⇐168

Duty of good-faith performance inheres in every contractual relation.

14. Torts ⇐10(3)

Although in isolation, furniture business seller's interferences with buyer's business might be justified as an overly zealous attempt to protect seller's interest under contract of sale, in total and in cumulative effect, as a course of action extending over three and one-half years and culminating in failure of buyer's business, the seller's acts crossed the threshold beyond what was incidental and justifiable to what was tortious and actionable as intentional interference with prospective economic relations.

15. Torts ⇐27

It could not be said that loss sustained by buyer of furniture business was due to unilateral decision to close after being served with seller's complaint rather than to seller's actions charged as intentional interference with prospective economic relations as jury could have found that lawsuit was but another instance of seller's ongoing pattern of harassment and parties had reached an impasse in that seller had refused to accept buyer's tender of payment in full and had refused to permit him to exercise option to purchase the building.

16. Torts ⇐26(2)

Alternative of improper purpose, or motive, intent or objective, will support a cause of action for intentional interference with prospective economic relations even where defendant's means were proper and that purpose will be satisfied where it can be shown that the actor's predominant purpose was to injure plaintiff.

17. Torts ⇐10(3)

Where deliberate interference by seller of furniture business with buyer's prospective economic relations with customers, suppliers and potential business associates was not an end in itself but an intermediate step to achieve long-range financial goal of profitably reselling building free of buyer's lease interest, the seller could not be held liable for tort of intentional interference with prospective economic relations on basis of the alternative of improper purpose, i.e., to injure or ruin buyer's business merely for sake of injury.

18. Torts ⇐10(3)

The alternative requirement of improper means to support an action for tort of intentional interference with prospective economic relations is satisfied where the means used to interfere with economic relations are contrary to law, such as violations of statutes, regulations or recognized common-law rules and such acts are illegal or tortious in themselves and are clearly improper means of interference unless they consist of constitutionally protected activity like the exercise of First Amendment rights. U.S.C.A. Const.Amend. 1.

19. Torts ⇐10(3)

Commonly included among the "improper means" alternative of the tort of intentional interference with prospective economic advantage are violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation or discouraging falsehood, and means may also be improper or wrongful because they violate an established standard of a trade or profession.

20. Malicious Prosecution ⇐39
Process ⇐168
Torts ⇐10(3)

Not only may institution of groundless lawsuits give rise to cause of action for tort of intentional interference with prospective economic relations but may also give rise to independent cause of action in tort for abuse of process and malicious prosecution.

21. Torts ⇐10(3)

A deliberate breach of contract, even where employed to secure economic advantage, is not by itself an "improper means" which will support cause of action for tort of intentional interference with prospective economic relations.

See publication Words and Phrases for other judicial constructions and definitions.

22. Torts ⇐10(3)

A party whose immediate purpose is to inflict injury does not satisfy the "improper purpose" element of the tort of intentional interference with prospective economic relations so long as the long-range or predominant purpose is to further a legitimate economic end.

See publication Words and Phrases for other judicial constructions and definitions.

23. Torts ⇐10(3)

Neither a deliberate breach of contract nor immediate purpose to inflict injury which does not predominate over legitimate economic end will, by itself, satisfy the "improper means" element of the tort of intentional interference with prospective economic relations but they may do so in combination.

24. Torts ⇐10(3)

Breach of contract committed for immediate purpose of injuring the other contracting party is an "improper means" that will satisfy the improper means element of the tort of intentional interference with economic relations.

25. Torts ⇐10(3)

Seller of furniture business could be held liable for tort of intentional interfer-

ence with prospective economic relations based on interference by improper means where it breached its express and implied contractual duties for the purpose of ruining the buyer's business.

26. Damages ⇐94

It was error to mechanically apply a ratio and reduce punitive damages award to 20 percent of compensatory damages award.

27. Damages ⇐94

Amount of compensatory damages is only one of a significant number of factors in awarding punitive damages.

28. Damages ⇐94

The jury or other fact finder has broad discretion in weighing the various factors in arriving at an appropriate award of punitive damages.

29. Damages ⇐94

Where jury found $65,000 compensatory damages for tortious interference with prospective economic relations and $35,000 punitive damages, it was error to order the punitive damages reduced to 20 percent of the compensatory damages, absent indication that punitive damages award was flagrantly excessive and unjust, especially in view of abundant evidence of interference by improper means.

30. Damages ⇐91(1)

Economic motives will not insulate a defendant from liability for punitive damages where he acts maliciously.

Gary R. Howe, W. Clark Burt, Salt Lake City, for Leigh Furniture and Carpet Co.

Arthur H. Nielsen, Clark R. Nielsen, Salt Lake City, for Isom.

OAKS, Justice:

In 1970, Leigh Furniture and Carpet Co., a corporation, sold a furniture business in St. George to T. Richard Isom on a contract specifying a $20,000 down payment for immediate possession, with the balance of $60,000 at $500 per month plus interest for ten years.

In 1975, when the contract balance was $27,000, Leigh Furniture (hereafter "the Leigh Corporation") brought this action against Isom to repossess the business, terminate his interest under the contract, and obtain a deficiency judgment for any sums due after liquidation. Isom denied that he was in default under the agreement, alleged his tender and the Leigh Corporation's refusal to accept the sum due under the contract, and counterclaimed for $100,000 damages caused when the Corporation intentionally and maliciously forced him out of business and into bankruptcy. Isom also sought punitive damages.

The jury found for Isom in all respects, including compensatory damages of $65,000 and punitive damages of $35,000 on his counterclaim. The district court denied the Leigh Corporation's motion for judgment notwithstanding the verdict, which challenged the legal and evidentiary basis for the verdict on the counterclaim. However, the court reduced the punitive damages to $13,000, and, upon Isom's accepting that remittitur, also denied the Corporation's motion for a new trial on the amount of punitive damages. Judgment was thereupon entered on the verdict against the Leigh Corporation (reduced as to punitive damages). The Corporation took this appeal, and Isom cross-appealed, challenging the reduction of punitive damages.

The issues on this appeal are exclusively concerned with Isom's recovery on the counterclaim. They are: (1) whether Utah has a cause of action for intentional interference with prospective economic relations; and, if so, (2) whether that tort was proved on the facts of this case; and (3) whether the punitive damages should have been reduced.

I. THE FACTS

With all conflicts resolved in favor of the prevailing party and all evidence viewed and inferences drawn in the light most supportive of the verdict of the jury, *Cintron v. Milkovich*, Utah, 611 P.2d 730, 732 (1980); *Ute-Cal Land Development Corp. v. Sather*, Utah, 605 P.2d 1240, 1245 (1980); *Lamkin v. Lynch*, Utah, 600 P.2d 530, 531 (1979), the facts were as follows.

Leigh Furniture, a closely held family corporation, operated a main store in Cedar City and branch stores in Kanab and St. George. The principal owner and chief executive officer was W.S. "Dub" Leigh (hereafter "Leigh"). In 1969, Leigh decided to sell the St. George store. He contacted T. Richard Isom ("Isom"), a Utah native then living in Washington State but desirous of returning to Utah, as a possible buyer. Discussions ensued, and Isom moved to St. George and began working as an employee in the Leigh store. On May 14, 1970, Isom signed the contract to buy the St. George store from the Leigh Corporation. Isom agreed to maintain the inventory, together with cash and accounts receivable, at a level of at least $60,000, and to provide the Leigh Corporation with an inventory each quarter and a financial statement each month.

In the same document, the Leigh Corporation leased Isom the parking lot and the first floor of the building containing the store, but expressly retained the second floor of the building, which consisted of 17 apartments the Corporation had leased to others. As monthly rental, Isom agreed to pay 3% of his gross sales for the previous month, with a minimum of $500 per month the first year and $600 per month thereafter. The lease term was ten years, with an option to renew for an additional ten years.

The contract also granted Isom an option to purchase the entire building, including the upstairs apartments, exercisable once he had paid the $60,000 balance on his contract. The option price was to be determined at the time of exercise by a committee of three appraisers, one to be appointed by each party and a third to be chosen by the other two.

Finally, the contract provided that if Isom defaulted in payment or performance of any term and the default remained uncured for 60 days, the Leigh Corporation could cancel the agreement, repossess the merchandise and real property, and retain all payments and rents as liquidated damages.

For one year, relations between the contracting parties were peaceful, but in June and July of 1971, Leigh began to complain about the contract and to state that he wanted to sell the entire building but prospective buyers would not purchase it subject to Isom's long-term lease and option to buy.[1] In a letter to Isom, Leigh complained that Isom was in default on his payments and was allowing his inventory to drop below $60,000. (Isom was behind in his payments at that time but was within the 60-day grace period in the contract and therefore was not in default.) At that same time, Leigh visited Isom in the store, verbally attacking him while he was with a customer and causing the customer to leave the store.

Beginning in July, 1971, Leigh, his wife, and the Corporation's bookkeeper, acting as the Leigh Corporation's agents, began a continuous pattern of visiting Isom at least once a week while he was working in his store, questioning him concerning his operation of the business, and making demands and accusations. In addition to the visits, Leigh wrote defendant letters criticizing various aspects of the business. In one week in the summer of 1971, Isom received four letters from Leigh, his wife, and his bookkeeper complaining about the furnace, the heat, and the delay in receiving the monthly financial statements. All of this conduct on Leigh's part had the cumulative effect of demoralizing and upsetting Isom and his employees, reducing their productivity, and impairing their ability to deal with the public and to conduct their business.

1. The court instructed the jury "that it has been established that W.S. Leigh was at all times acting as the agent for plaintiff, Leigh Furniture and Carpet Company, and within the scope of his authority at the time of the events out of which this action arose." That ruling, to which there was no objection, makes the Leigh Corporation fully responsible for all of Leigh's actions in this matter.

At the same time, despite the existing contract with Isom, Leigh attempted to sell the building to two of Isom's employees.

In December, 1971, the Leigh Corporation's attorney again informed Isom that Leigh was dissatisfied with the contract and Isom's performance under it, and demanded an audit of the store's inventory and books. Although no provision of the contract entitled the Leigh Corporation to audit Isom's business and Leigh's demand came during Isom's busy Christmas season, Isom agreed on condition that the audit be taken after the new year and that it be confidential. The audit was performed by a certified public accountant employed by the Corporation in its Cedar City store. Following the audit, the accountant called Isom's father, an attorney who represented Isom, to inform him that a change in Isom's business was needed and to recommend that Isom bring in a business associate who had expertise in furniture retailing and who could contribute some additional working capital to the business.

The Corporation's weekly visits continued through the summer of 1972. In the spring of 1972, the Leigh Corporation's bookkeeper, on one of his visits to Isom's store, insisted that Isom date all his accounts receivable. Isom refused. Later that same summer, while visiting the store, Leigh accused Isom of subletting the parking lot in violation of the lease agreement and threatened to terminate Isom's business and repossess the store. Isom had permitted a friend to fence a portion of the vacant lot on the property he leased from the Corporation to temporarily store some merchandise for a plumbing business. In response to Leigh's threats, Isom had his friend remove his merchandise and the fence.

In June or July, 1972, Leigh again met with Isom's attorney (his father) to complain about Isom's performance under the contract. Leigh said he felt Isom maintained an inadequate inventory to act as security, and to alleviate his feelings of financial insecurity he wanted to sell the building to someone else. He also suggested that Isom bring in an associate with additional capital and more experience in furniture retailing. Specifically, Leigh suggested Brent Talbot, who had available capital and twenty years' experience in furniture retailing. Leigh indicated that if Talbot came in as a business partner "everything would be all right."

In response to this discussion, Isom's attorney began to pursue partnership discussions with a Mr. Hayes Hunter, who owned and operated a furniture store in Cedar City. On one of two trips that he and Hunter made to inspect Isom's business, they were observed together in Isom's store by the Leigh Corporation's bookkeeper. A few days later, Isom's attorney received a phone call from Leigh, who angrily told him that if he had any ideas about bringing Hayes Hunter into the business, he "could forget it" because Leigh wouldn't have Hunter in the store. Thereafter, at Hunter's request, neither Isom nor his attorney pursued any further negotiations with Hunter regarding a possible partnership.

Approximately a month later, in August, 1972, Leigh again told Isom's attorney that Isom needed to have Talbot as a partner and encouraged him to pursue negotiations toward that end. Leigh again complained about the long-term lease he had given Isom and stated that he "should kick [Isom] out" and sell the building.

Shortly after this discussion, Leigh's attorney sent Isom's attorney a complaint Leigh intended to file in court to terminate the sale agreement and dispossess Isom. Oral and written negotiations ensued, during which Isom attempted to arrive at some settlement of Leigh's complaints and resolve all the disputes embodied in the threatened lawsuit.

On September 28, 1972, the parties signed a supplemental agreement, drafted by Leigh's attorney, which incorporated and supplemented the original contract. Among other things, it required Isom (1) to advance $20,000 toward the unpaid balance of the purchase price (a condition demanded by Leigh), half upon execution of the supplemental agreement and half on or before January 15, 1973; and (2) to obtain Leigh's prior written approval of any person to whom Isom intended to convey any ownership interest in the business whether as partner, investor, or corporation shareholder.[2] Isom paid the $20,000 in accordance with the supplemental agreement, which reduced the unpaid balance on the purchase price to $27,000 in January, 1973, and prepaid the monthly installments under the contract through December, 1975.

The supplemental agreement was intended to resolve all the disputes between Leigh and Isom. However, even after its execution, Leigh continued to pursue previously initiated lawsuits against Isom, causing Isom to incur the expense and effort of defending two groundless actions. In the first, Leigh sued Isom and a former employee, Francis Leany, for $4,000—the value of furniture Leany had purchased from the Leigh Corporation while employed in its St. George store. After trial in December, 1972, the court found that the Corporation and Leany had offset their accounts long before Isom acquired the business and ruled that the Corporation had no right to the disputed $4,000. The suit was dismissed on January 26, 1973.

In the second action, a plumbing company sued the Leigh Corporation and Isom to recover $2,000 worth of repair work it had performed on the furnace in the leased building. In accordance with the contract, Isom had paid the first $500 toward the cost of repair. Although the contract made the Corporation, as lessor, responsible for all costs in excess of $500, it refused to pay the balance of the repair bill, asserting instead that Isom was liable. After another trial, the court sustained Isom's position and required the Leigh Corporation to pay the balance of the repair bill.

After the $20,000 prepayment and the execution of the supplemental agreement, Leigh continued to visit defendant to check on his operation of the business, but his visits, either in person or through his wife and employees, became less frequent and less demanding. Other than Isom's required defense of the two groundless suits, the period between October, 1972, and April, 1974, was relatively calm. Isom was able to devote himself to operating his business, and the $27,000 net loss for the calendar year 1970 was turned into a $17,000 net profit for the calendar year 1973. Isom's store continued to make a profit into the first part of 1974, accruing a net profit of $5,000 through August, 1974.

In April, 1974, following the conclusion of the lawsuit by the plumbing company, Leigh renewed his questions and pressures on Isom. Leigh continually complained to Isom about the store's inventory, the air conditioner, the length of time it took Isom's accountant to prepare the monthly financial statements, and the format of the financial statements. Leigh refused to pay for a store window broken by customers of the adjacent bicycle shop, even though the contract gave the Corporation "the obligation of all exterior maintenance and repairs to the building." The heating bills began to accumulate because the Leigh Corporation refused to pay its share in violation of the contract provision that required it "to pay 60% of the cost of space heating, payable each month heat is furnished the apartments." To resolve the matter, Isom was required to make trips to Cedar City.

Leigh and other representatives of the Corporation continued to visit Isom while he was at work in the store, demanding that he produce various documents and records and reiterating demands that he date his accounts receivable. Leigh renewed his threats to cancel the contract. Isom was required to spend a substantial amount of his time attending to these visits and responding to the demands. During this same time, sales began to decline, and the store became unproductive.

In the summer of 1974, Isom's attorney followed Leigh's prior suggestions by ap-

2. Contemporaneous with the execution of the supplemental agreement, Leigh gave his written approval of two individuals whom Isom requested as prospective partners in the business. For reasons unrelated to this lawsuit, neither of these men ever acquired any interest in the business with Isom.

proaching Brent Talbot about joining Isom's business. He wrote Leigh and his attorney requesting Leigh's approval, but Leigh did not respond. Isom's attorney again wrote to Leigh, outlining the advantages of bringing Talbot into the business. Isom and Talbot eventually reached a tentative partnership agreement, but Leigh refused to approve Talbot unless Isom agreed to terminate his contract and his ten-year lease, "drop out" of the store completely, and turn it back to Leigh. These terms being unacceptable to Isom, the negotiations with Talbot were discontinued. Thereafter, Isom's attorney submitted repeated requests to associate a Mr. Applegate in the business, but never received any response from Leigh.

Leigh's continuing threats to evict Isom had a demoralizing effect on Isom and his employees. Isom devoted a considerable amount of time to responding to in-store visits by Leigh, his wife, and his bookkeeper. These visits interrupted sales activities, and provoked complaints from his customers. The business declined, dissipating the $5,000 profit of August, 1974. By December, 1974, the business showed a net loss of $6,500. Isom concluded that he would have to pay off the $27,000 remaining on the purchase price to keep Leigh from active interference in the affairs of the store. To raise the necessary funds, he was required to take additional time away from his business.

On December 29, 1974, Isom's attorney met with Leigh in San Francisco, where he informed Leigh of Isom's plans to pay the balance of the purchase price. Leigh replied that Isom could do whatever he wanted. Isom's attorney again requested Leigh's approval of Talbot as a business partner after full payment of the purchase price and under the long-term lease and purchase option of the contract. Leigh again refused to approve Talbot as a partner. He reiterated his regret at having granted a long-term lease and stated that he had to get the property back. He suggested that Isom liquidate all the store's stock and turn the store back to him. Leigh also refused to appoint an appraiser as required by the original contract, so that Isom could exercise his option to purchase the property.

Isom's attorney again met with Leigh and Leigh's attorney on February 14, 1975, and told them the $27,000 balance on the purchase price would soon be paid and that Isom planned to exercise his option to buy the property. Leigh stated he would not sell the property to Isom for its $130,000 value (as determined by Isom's appraiser, subject to Isom's leasehold) because he had an offer to sell the property for $200,000 free of Isom's lease and option. Although at the conclusion of the meeting Leigh agreed to appoint an appraiser to permit Isom to exercise the purchase option in accordance with the original contract of sale, he later refused to do so and, in fact, never did.

On February 24, 1975, without notifying Isom of any default, Leigh filed the complaint in this case, seeking to repossess the premises and terminate Isom's interest under the contract. Three days later, unaware that the complaint had been filed, Isom tendered to Leigh the $27,000 balance due. He requested that Leigh give a receipt for the payment, appoint an appraiser to facilitate his exercise of the purchase option, and approve Brent Talbot as his business associate under the existing lease if the purchase of the building were not accomplished.

Isom learned of the lawsuit before he was served with process. Though demoralized, he nevertheless continued to negotiate with Leigh and to operate the business through February, 1975. Leigh never responded to Isom's tender of the remaining $27,000, although he again told Isom's attorney that he would never approve Talbot's association with Isom under the long-term lease, even for the few months required to finance a purchase of the building, nor would he permit a sale of the property for its appraised value of $130,000. When confronted by Isom's attorney and accused of being recalcitrant so that Isom's business would fail and Leigh could reacquire the business and property, Leigh made no denial.

In March, 1975, while talking to a customer in his store, Isom was served with Leigh's complaint. This service of process despite his continuing efforts to negotiate, surprised and upset Isom so much that he dismissed the customer he had been helping. Upon reading the complaint, he noted that it appeared to be the same complaint Leigh had threatened to file in 1972 and that it reopened the disputes which the supplemental agreement and the prepayment of $20,000 had been intended to resolve. Because of the complaint's prayer for an order restraining Isom from doing further business until an audit could be conducted to determine if he was maintaining adequate security for the $27,000 balance, Isom concluded he could do no further business. He therefore closed the store immediately after being served. Within the next week, Isom's suppliers contacted him to request return of their furniture. Isom replied that at that time he was unable to determine whether he would remain in business, but that he could not release any of his inventory until the dispute with Leigh was finally resolved. Isom declared bankruptcy shortly thereafter.

At trial, there was expert testimony that the value of Isom's leasehold was $45,000, and the net value of Isom's furniture retailing business as of March, 1975, was $59,300. Isom testified that he paid the Leigh Corporation a total of $53,000 plus interest on the total $80,000 purchase price, none of which he recouped. He further testified that because of his bankruptcy he was never able to exercise his option to purchase the building. The record further indicates that through bankruptcy proceedings, the Leigh Corporation, as secured party, finally achieved its goal of reacquiring the business, including inventory, accounts receivable, and the leased premises.

II. INTERFERENCE WITH CONTRACT

[1] Leigh Furniture first contends that Isom's recovery cannot be sustained as an interference with contract because the evidence showed no conduct which "intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract." *Restatement (Second) of Torts* § 766 (1979). *See also Bunnell v. Bills*, 13 Utah 2d 83, 90, 368 P.2d 597, 602 (1962); W. Prosser, *Handbook of the Law of Torts* § 129 at 929 30 (4th ed. 1971); *Annot.*, 26 A.L.R.2d 1227 (1952). In this case, the only contract in evidence was the contract between Isom and the Leigh Corporation. It is settled that one party to a contract cannot be liable for the tort of interference with contract for inducing a breach by himself or the other contracting party. *Dryden v. Tri-Valley Growers*, 65 Cal.App.3d 990, 998, 135 Cal.Rptr. 720, 725-26 (1977); *Cuker Industries, Inc. v. William L. Crow Construction Co.*, 6 A.D.2d 415, 178 N.Y.S.2d 777 (1958); *Houser v. City of Redmond*, 91 Wash.2d 36, 39, 586 P.2d 482, 484 (1977); *Kvenild v. Taylor*, Wyo., 594 P.2d 972, 977 (1979). Isom having failed to prove a cause of action for intentional interference with contract, we cannot sustain the verdict on that theory.

[2] However, the right of action for interference with a specific contract is but one instance, rather than the total class, of protections against wrongful interference with advantageous economic relations. *Sumwalt Ice Co. v. Knickerbocker Ice Co.*, 114 Md. 403, 414, 80 A. 48, 50 (1911); 1 F. Harper & F. James, *The Law of Torts* § 6.11 (1956); *Restatement (Second) of Torts* § 766 comment c (1979); 45 Am. Jur.2d *Interference* §§ 49 51 (1969). We therefore proceed to consider whether the jury's verdict for Isom can be sustained on the basis of the related tort of interference with prospective economic relations.

[3-5] If so, we can affirm the judgment. Consistent with the well-settled principle that the appellant has the burden of demonstrating that any error has affected his substantial rights, Utah R.Civ.P. 61; *Startin v. Madsen*, 120 Utah 631, 636, 237 P.2d 834, 836 (1951), we follow the authorities that exercise every reasonable presumption in favor of the validity of a general verdict. Specifically, where more than one cause of

action has been submitted to a jury and where one of those causes of action was error-free, supported by substantial evidence, and an appropriate basis for the general verdict, the judgment on that verdict will be affirmed, even though the evidence was insufficient to sustain the verdict on one of the other causes of action submitted. *Berger v. Southern Pacific Co.*, 144 Cal. App.2d 1, 5, 300 P.2d 170, 173 (1956); *Granone v. County of Los Angeles*, 231 Cal. App.2d 629, 42 Cal.Rptr. 34, 51 (1965); *Aaronson v. City of New Haven*, 94 Conn. 690, 110 A. 872 (1920); *In re Van Houten's Will*, 147 Iowa 725, 124 N.W. 886 (1910); *Watson v. Long*, Mo.App., 221 S.W.2d 967, 971 (1949); *Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir.1980) (applying Cal. law); *Adkins v. Ford Motor Co.*, 446 F.2d 1105, 1108 (6th Cir.1971) (applying Tenn. law). *See generally* 5 Am.Jur.2d *Appeal and Error* § 787 (1962).

III. INTERFERENCE WITH PROSPECTIVE ECONOMIC RELATIONS

A. History and Elements of the Tort

[6, 7] The tort of intentional interference with prospective economic relations reaches beyond protection of an interest in an existing contract and protects a party's interest in prospective relationships of economic advantage not yet reduced to a formal contract (and perhaps not expected to be). *Buckaloo v. Johnson*, 14 Cal.3d 815, 537 P.2d 865, 868–69, 122 Cal.Rptr. 745, 748–49 (1975); *Restatement, supra*, § 766B comment c; W. Prosser, *supra*, § 130. Although previously faced with arguments or circumstances presenting the issue, *e.g.*, *Searle v. Johnson*, Utah, 646 P.2d 682, 683 (1982); *Soter v. Wasatch Development Corp.*, 21 Utah 2d 224, 443 P.2d 663 (1968), we have never expressly resolved the question of whether Utah recognizes this tort. We now resolve that question, in the affirmative.

The plethora of decided cases and abundant literature on the tort of intentional interference with prospective economic relations has been helpful in our consideration.[3] In summarizing the history of this tort, the *Restatement (Second) of Torts*, ch. 37, "Interference with Contract or Prospective Contractual Relation" (1979), observes that its elements are a curious blend of the principles of liability for intentional torts (in which the plaintiff proves a prima facie case of liability, subject to the defendant's proof of justification) and for negligent torts (in which the plaintiff must prove liability based on the interplay of various factors). The disagreement and confusion incident to this blend of intentional and negligent tort principles has produced two different approaches to the definition of this tort.

Influenced by the model of the intentional tort, many jurisdictions and the first *Restatement of Torts* define the tort of intentional interference with prospective economic relations as a prima facie tort, subject to proof of privilege as an affirmative defense. To recover, the plaintiff need only prove a prima facie case of liability, *i.e.*, that the defendant intentionally interfered with his prospective economic relations and caused him injury. As with other intentional torts, the burden of going forward then shifts to the defendant to demonstrate as an affirmative defense that under the circumstances his conduct, otherwise culpable, was justified and therefore privileged.[4] This is the approach assumed

3. *See, e.g.*, Estes, "Expanding Horizons in the Law of Torts—Tortious Interference," 23 Drake L.Rev. 341 (1974); Harper, "Interference with Contractual Relations," 47 Nw.U.L.Rev. 873 (1953); Perlman, "Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine," 49 U.Chi. L.Rev. 61 (1982); Sayre, "Inducing Breach of Contract," 36 Harv.L.Rev. 663 (1922–23); "Developments in the Law—Competitive Torts," 77 Harv.L.Rev. 888 (1964); Note, "Tortious Interference with Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity," 81 Colum.L.Rev. 1491 (1981); "Interference with Contract Relations," 41 Harv.L.Rev. 728 (1927–28); *Annot.*, 9 A.L.R.2d 228 (1950); *Annot.*, 5 A.L.R.4th 9 (1981); *Annot.*, 6 A.L.R.4th 195 (1981).

4. *See, e.g., St. Louis-San Francisco Railway Co. v. Wade*, 607 F.2d 126, 132–33 (5th Cir.1979); *Buckaloo v. Johnson*, 14 Cal.3d 815, 537 P.2d 865, 872, 122 Cal.Rptr. 745, 752 (1975); *Alfred A. Altimont, Inc. v. Chatelain, Samperton & Nolan, D.C.*, 374 A.2d 284, 289 (1977); *Owen v. Williams*, 322 Mass. 356, 360, 77 N.E.2d 318, 320–21 (1948); *Carnes v. St. Paul Union Stockyards Co.*, 164 Minn. 457, 465, 205 N.W. 630, 633 (1925); *Baker v. Dennis Brown Realty, Inc.*, 121 N.H. 640, 433 A.2d 1271, 1274 (1981); *Mitchell v. Aldrich*, 122 Vt. 19, 24, 163 A.2d 833, 836–37 (1960); *Calbom v. Knudtzon*, 65 Wash.2d 157, 162–63, 396 P.2d 148, 151–52 (1964). This approach is also adopted by F. Harper & F. James, The Law of Torts, §§ 6.11–.12 (1956); *Annot.*, 5 A.L.R.4th 9 § 2[b] (1981); and 45 Am.Jur.2d Interference § 56 (1969).

in several Utah decisions describing the related tort of interference with contract. *Bunnell v. Bills*, 13 Utah 2d 83, 90, 368 P.2d 597, 602–03 (1962); *Gammon v. Federated Milk Producers Association, Inc.*, 11 Utah 2d 421, 426, 360 P.2d 1018, 1022 (1961), and 14 Utah 2d 291, 295–96, 383 P.2d 402, 405–06 (1963). This approach was also suggested in a subsequent case that described (though it did not formally adopt) the tort of intentional interference with prospective economic relations. *Searle v. Johnson*, Utah, 646 P.2d 682 (1982).

The problem with the prima facie-tort approach is that basing liability on a mere showing that defendant intentionally interfered with plaintiff's prospective economic relations makes actionable all sorts of contemporary examples of otherwise legitimate persuasion, such as efforts to persuade others not to eat certain foods, use certain substances, engage in certain activities, or deal with certain entities. The major issue in the controversy—justification for the defendant's conduct—is left to be resolved on the affirmative defense of privilege. In short, the prima facie approach to the tort of interference with prospective economic relations requires too little of the plaintiff.

Under the second approach, which is modeled after other negligent torts, the plaintiff must prove liability based on the interplay of various factors. The *Restatement (Second) of Torts* now defines an actionable interference with prospective economic relations as an interference that is both "intentional" and "improper." *Id.* at § 766B.[5] Under this approach, the trier of fact must determine whether the defendant's interference was "improper" by balancing and counterbalancing seven factors, including the interferor's motive, the nature of his conduct and interests, and the nature of the interests with which he has interfered. *Id.* at § 767. In those jurisdictions which have followed the negligence model, the plaintiff bears the burden of proving that in view of all of these factors the defendant's interference was improper. This obviously imposes a very significant burden on the plaintiff and magnifies the difficulty of resolving some contested issues on the pleadings. So far as we have been able to discover, only four states have specifically adopted the *Restatement (Second)* definition of the elements of this tort,[6] though others have apparently applied some portion of the *Restatement* formulation in their own definitions.[7]

In short, there is no generally acknowledged or satisfactory majority position on the definition of the elements of the tort of

5. The text of Restatement (Second) of Torts § 766B (1979) states:

> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of
>
> (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
>
> (b) preventing the other from acquiring or continuing the prospective relation.

6. *Dolton v. Capital Federal Savings & Loan Ass'n*, Colo.App., 642 P.2d 21, 23 (1981); *Weitting v. McFeeters*, 104 Mich.App. 188, 304 N.W.2d 525 (1981); *United Wild Rice, Inc. v. Nelson*, Minn., 313 N.W.2d 628, 632–33 (1982); *Yaindl v. Ingersoll Rand Co. Standard Pump-Aldrich Div.*, 281 Pa.Super. 560, 422 A.2d 611, 621–22 & n. 11 (1980).

7. *See, e.g., Insurance Field Services, Inc. v. White & White Inspection & Audit Service, Inc.*, Fla.Dist.Ct.App., 384 So.2d 303, 306–07 (1980); *Belden Corp. v. Internorth, Inc.*, 90 Ill.App.3d 547, 45 Ill.Dec. 765, 413 N.E.2d 98, 101–02 (1980); *Stoller Fisheries, Inc. v. American Title Insurance Co.*, Iowa, 258 N.W.2d 336, 340 (1977); *Anderson v. Dairyland Insurance Co.*, 97 N.M. 155, 637 P.2d 837 (1981).

intentional interference with prospective economic relations. In its historical review, the *Restatement (Second) of Torts* states that "the law in this area has not fully congealed but is still in a formative stage" so that the "several forms of the tort . . . are often not distinguished by the courts, and cases have been cited among them somewhat indiscriminately." *Id.*, Introductory Note to ch. 37 at 5. We concur in the *Restatement (Second)*'s rejection of the prima facie tort approach because it leaves too much uncertainty about the requirements for a recognized privilege and the defendant's burden of pleading and proving these and other matters. *Id.* But we also reject the *Restatement (Second)*'s definition of the tort because of its complexity. We seek a better alternative.

Oregon has outlined a middle ground by defining the tort of interference with prospective economic relations so as to require the plaintiff to allege and prove more than the prima facie tort, but not to negate all defenses of privilege. Privileges remain as affirmative defenses. This approach originated with Justice Linde's opinion in *Top Service Body Shop, Inc. v. Allstate Insurance Co.*, 283 Or. 201, 582 P.2d 1365 (1978). After summarizing the history of this tort and specifically refusing to require a plaintiff to prove that the interference was "improper" under the balancing-of-factors approach specified in the *Restatement (Second)*, the court defined the cause of action for "wrongful interference with economic relationships" as follows:

> Either the pursuit of an improper objective of harming plaintiff or the use of wrongful means that in fact cause injury to plaintiff's contractual or business relationships may give rise to a tort claim for those injuries. . . . In summary, such a claim is made out when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself. Defendant's liability may arise from improper motives or from the use of improper means.

Top Service Body Shop, Inc., 283 Or. at 205, 209, 582 P.2d at 1368, 1371. A subsequent decision of that court restated and elaborated what the plaintiff must prove, as follows:

> In *Top Service* we decided that the defendant's improper intent, motive or purpose to interfere was a necessary element of the plaintiff's case, rather than a lack thereof being a matter of justification or privilege to be asserted as a defense by defendant. Thus, to be entitled to go to a jury, plaintiff must not only prove that defendant intentionally interfered with his business relationship but also that defendant had a duty of non-interference; *i.e.*, that he interfered for an improper purpose rather than for a legitimate one, or that defendant used improper means which resulted in injury to plaintiff.

Straube v. Larson, 287 Or. 357, 361, 600 P.2d 371, 374 (1979). *Cf. Anderson v. Dairyland Insurance Co.*, 97 N.M. 155, 637 P.2d 837, 840–41 (1981) (nominally adopting the *Restatement (Second)* definition in Section 766B but using the Oregon elements of improper means or improper motive to define requirement that interference be "improper").

[8, 9] We recognize a common-law cause of action for intentional interference with prospective economic relations, and adopt the Oregon definition of this tort. Under this definition, in order to recover damages, the plaintiff must prove (1) that the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff. Privilege is an affirmative defense, *Searle v. Johnson*, Utah, 646 P.2d 682 (1982), which does not become an issue unless "the acts charged would be tortious on the part of an unprivileged defendant." *Top Service Body Shop, Inc.*, 283 Or. at 210, 582 P.2d at 1371.

B. Jury Instructions

In this case, the trial court apparently instructed the jury jointly on the separate intentional torts of interference with contract and interference with prospective economic relations. As noted in Part II, the verdict cannot be sustained as to the former, so the only remaining question is whether the instruction and evidence permit the verdict to be sustained as to the latter.

So far as it related to the elements of proof of the two torts, the trial court's entire instruction was as follows:

> [Isom's] counterclaim is based on a theory of tortious interference with a business relationship and with contractual rights. Before you can find the [Corporation] liable for tortious interference, you must find that the following elements have been proved by a preponderance of the evidence:
>
> 1. The existence of a valid contract or business relationship both existing and prospective;
> 2. Knowledge of the contract or relationship by the alleged interferor;
> 3. An intentional interference which causes a breach or termination of the business relationship or contract;
> 4. Without justification;
> 5. Which results in damage to the party whose business relationship or contract has been disrupted.
>
> * * * * * *
>
> You are instructed that if you find that the [Corporation] was reasonably acting to protect a legitimate economic interest of its own, arising out of or in conjunction with the May 14, 1970 agreement, was exercising its right to terminate the agreement, or was exercising its right to assert an honest claim, then the [Corporation's] conduct was justified and privileged and not wrongful or malicious and [Isom] is not entitled to recover for any intentional interference with business or contractual relations.

[10] As to the tort of interference with prospective economic relations, this instruction does not precisely mirror the elements we have just specified, because it does not expressly require Isom to prove "improper purpose or improper means." However, the instruction does require Isom to prove that the Corporation's action was "without justification."[8] Because of the way that term was defined in the instructions, we are satisfied that the jury's verdict is premised upon findings that include each of the elements in the cause of action as we have defined it, and any disparity of phraseology between the given instruction and the new definition was not prejudicial.

Under the trial court's definition of "justification," the jury had to find that the Corporation's conduct was "wrongful or malicious" before they could find for Isom. Those terms are functionally equivalent to "improper means or improper purpose." Conversely, if the jury found that the Corporation "was reasonably acting to protect a legitimate economic interest of its own, arising out of or in conjunction with the May 14, 1970 agreement" (such as its right to terminate the agreement or to assert an honest claim thereunder), then the Corporation's conduct was "justified and privileged and not wrongful or malicious," and Isom was not entitled to recover. In view of this instruction, we conclude that the verdict for Isom was clearly based on the jury's finding that the Corporation *was not* reasonably acting to protect its legitimate economic interest under the agreement, and is tantamount to a finding that the Corporation's conduct *was* "wrongful or malicious." The trial court's instruction imposed an even heavier burden on the plaintiff (here, the counterclaimant, Isom) than our definition, since it required the plaintiff to negate the existence of any justification. Consequently, we proceed to consider whether the evidence was sufficient to sustain a verdict for the cause of action as we have defined it.

C. Evidence of Intentional Interference and Causation

[11, 12] Reviewing the record, we conclude that there was sufficient evidence to sustain the jury's verdict against the Leigh

8. In *Coronado Mining Corp. v. Marathon Oil Co.*, Utah, 577 P.2d 957, 960 (1978), we stated: "The exercise of a legal right constitutes justification and is a complete defense to an action of tortious intervention of contractual rights."

Corporation for intentional interference with prospective economic relations that caused injury to Isom.

There was ample evidence that Isom had business relationships with various customers, suppliers, and potential business associates, and that Leigh, the former owner of the business, understood the value of those relationships. There was also substantial competent evidence that the Corporation, through Leigh, his wife, and his bookkeeper, intentionally interfered with and caused a termination of some of those relationships (actual or potential). Their frequent visits to Isom's store during business hours to confront him, question him, and make demands and inquiries regarding the manner in which he was conducting his business repeatedly interrupted sales activities, caused his customers to comment and complain, and more than once caused a customer to leave the store. Driving away an individual's existing or potential customers is the archetypical injury this cause of action was devised to remedy. *E.g., Guillory v. Godfrey*, 134 Cal.App.2d 628, 286 P.2d 474 (1955); *Tuttle v. Buck*, 107 Minn. 145, 119 N.W. 946 (1909); W. Prosser, *Handbook of the Law of Torts* § 130 (4th ed. 1971); *Restatement (Second) of Torts* § 766B(a).

Other actions by which the Leigh Corporation imposed heavy demands on Isom's time and financial resources to the detriment of his ability to attract and retain customers and conduct the other activities of his business included: numerous letters of complaint, Leigh's demand for an audit of Isom's books and inventory during the busy holiday season, his continued threats to cancel the contract and sell the building and business to another buyer, his refusal to pay the contracted share of the heating bills or the cost of repairing the furnace and the store's broken window, his refusal of the tendered payment of the balance due under the contract, and his suit for repossession, termination, and injunction. Leigh's refusals also prevented Isom from consummating potentially advantageous business associations with Hunter, with Talbot, and finally with Applegate, all experienced retailers able to contribute expertise and additional capital to Isom's business.

[13, 14] Taken in isolation, each of the foregoing interferences with Isom's business might be justified as an overly zealous attempt to protect the Corporation's interests under its contract of sale. As such, none would establish the intentional interference element of this tort, though some might give rise to a cause of action for breach of specific provisions in the contract or of the duty of good faith performance which inheres in every contractual relation. Even in small groups, these acts might be explained as merely instances of aggressive or abrasive—though not illegal or tortious—tactics, excesses that occur in contractual and commercial relationships. But in total and in cumulative effect, as a course of action extending over a period of three and one-half years and culminating in the failure of Isom's business, the Leigh Corporation's acts cross the threshold beyond what is incidental and justifiable to what is tortious. The Corporation's acts provide sufficient evidence to establish two of the elements in the definition of this tort: an intentional interference with present or prospective economic relations that caused injury to the plaintiff.

[15] Focusing on the issue of causation, the Leigh Corporation argues that Isom's losses resulted from his inadequate working capital or from his unilateral decision to close his store immediately after being served with the complaint and to file for bankruptcy shortly thereafter. These arguments are unavailing because there was substantial evidence of causation to support the jury's verdict. For example, the jury could have found that the initiation of this lawsuit was but another instance of the Corporation's ongoing pattern of harassment, which made it impossible for Isom to continue to operate his business with any anticipation of success or profit. The parties had reached an impasse: Leigh had refused to accept Isom's tender of payment in full and had refused to permit Isom to exercise his option to purchase the building

or to associate himself with experienced partners. Upon being served with the complaint, Isom could reasonably have concluded that the Corporation's interference and harassment would continue to thwart his commercial efforts for the foreseeable future. On analogous facts, a California court held in a case involving a seller's malicious interference with his buyer's business that "it was reasonable for [the buyer] to have elected to close rather than to continue to accumulate operating expenses without receipts coming in to meet them." *Drouet v. Moulton*, 245 Cal.App.2d 667, 54 Cal.Rptr. 278, 282 (1966).

The evidence was also sufficient to support the verdict under the requirement that the intentional interference with prospective economic relations (in this case, Isom's relations with his customers, suppliers, and potential business associates) must have been for an improper purpose or by the use of improper means. These two alternatives are discussed in the next two sections.

D. Improper Purpose

[16] The alternative of improper purpose (or motive, intent, or objective) will support a cause of action for intentional interference with prospective economic relations even where the defendant's means were proper. In the context of the related tort of interference with contract, *Prosser* had this to say about improper purpose:

> Since *Lumley v. Gye* there has been general agreement that a purely "malicious" motive, in the sense of spite and a desire to do harm to the plaintiff for its own sake, will make the defendant liable for interference with a contract. The same is true of a mere officious intermeddling for no other reason than a desire to interfere. On the other hand, in the few cases in which the question has arisen, it has been held that where the defendant has a proper purpose in view, the addition of ill will toward the plaintiff will not defeat his privilege. It may be suggested that here, as in the case of mixed motives in the exercise of a privilege in defamation and malicious prosecution, the court may well *look to the predominant purpose underlying the defendant's conduct.* [Citations omitted; emphasis added.]

W. Prosser, *Handbook of the Law of Torts* § 129 at 943 (4th ed. 1971).

Because it requires that the improper purpose predominate, this alternative takes the long view of the defendant's conduct, allowing objectionable short-run purposes to be eclipsed by legitimate long-range economic motivation. Otherwise, much competitive commercial activity, such as a businessman's efforts to forestall a competitor in order to further his own long-range economic interests, could become tortious. In the rough and tumble of the marketplace, competitors inevitably damage one another in the struggle for personal advantage. The law offers no remedy for those damages—even if intentional—because they are an inevitable byproduct of competition. Problems inherent in proving motivation or purpose make it prudent for commercial conduct to be regulated for the most part by the improper means alternative, which typically requires only a showing of particular conduct.[9]

The alternative of improper purpose will be satisfied where it can be shown that the actor's predominant purpose was to injure the plaintiff. *St. Louis-San Francisco Railway Co. v. Wade*, 607 F.2d 126, 133 (5th

9. On this same point, the Restatement (Second) of Torts holds that a competitor's interference with a prospective contractual relation is not improper if, among other things, "his purpose is at least in part to advance his interest in competing with the other." *Id.* § 768(d). The authors explain:

> The rule . . . developed to advance the actor's competitive interest and the supposed social benefits arising from it. If his conduct is directed, at least in part, to that end, the fact that he is also motivated by other impulses, as, for example, hatred or a desire for revenge is not alone sufficient to make his interference improper. But if his conduct is directed solely to the satisfaction of his spite or ill will and not at all to the advancement of his competitive interests over the person harmed, his interference is held to be improper.

Id. § 768 comment g.

Cir.1979); *Alyeska Pipeline Service Co. v. Aurora Air Service, Inc.*, Alaska, 604 P.2d 1090 (1979); *Dunshee v. Standard Oil Co.*, 152 Iowa 618, 132 N.W. 371 (1911); *Tuttle v. Buck*, 107 Minn. 145, 119 N.W. 946 (1909); *Wesley v. Native Lumber Co.*, 97 Miss. 814, 53 So. 346 (1910); *Huston v. Trans-Mark Services, Inc.*, 45 Or.App. 801, 609 P.2d 848 (1980); Prosser, § 129, quoted *supra*.

For example, in *Alyeska Pipeline Service Co., supra*, the parties had a contract under which RCA provided a communications system along Alyeska's pipeline. RCA, in turn, contracted with Aurora to furnish air transportation along the route. About a year later, Aurora lost its contract with RCA when Alyeska elected to take over the air transportation function under a contract provision that permitted it to do so. Aurora thereupon sought damages from Alyeska, alleging that Alyeska's decision, which caused RCA to terminate its contract with Aurora, had been motivated by spite, resulting from an earlier payment dispute and litigation between Alyeska and Aurora. Alyeska pleaded that it had acted to further its own economic and safety interests. The Alaska Supreme Court upheld a jury verdict against Alyeska, explaining:

> [I]f one does not act in a good faith attempt to protect his own interest or that of another but, rather, is *motivated by a desire to injure the contract party*, he forfeits the immunity afforded by the privilege. [Authorities cited.] . . . In the case at bar, the central factual issue . . . was *whether Alyeska was genuinely furthering its own economic and safety interests or was using them as a facade for inflicting injury upon Aurora*. There was sufficient evidence upon which the jury could properly find that Alyeska was acting out of ill will towards Aurora, rather than to protect a legitimate business interest. [Emphasis added.]

604 P.2d at 1094.

[17] As noted earlier, there is substantial evidence that the Leigh Corporation deliberately injured Isom's economic relations. But that injury was not an end in itself. It was an intermediate step toward achieving the long-range financial goal of profitably reselling the building free of Isom's interest. Because that economic interest seems to have been controlling, we must conclude that the evidence in this case would not support a jury finding that the Corporation's predominant purpose was to injure or ruin Isom's business merely for the sake of injury alone.

However, because we will affirm the judgment on the general verdict on any ground for which there is substantial factual support in the record, *Berger v. Southern Pacific Co.* and other authorities cited in Part II, *supra*, we must examine the record to determine whether the verdict can be supported on the basis of the alternative that the Corporation's interference was accomplished by improper means.

E. Improper Means

[18, 19] The alternative requirement of improper means is satisfied where the means used to interfere with a party's economic relations are contrary to law, such as violations of statutes, regulations, or recognized common-law rules. Such acts are illegal or tortious in themselves and hence are clearly "improper" means of interference, *Searle v. Johnson*, Utah, 646 P.2d 682 (1982) (secondary boycott); *Gammon v. Federated Milk Producers Association, Inc.*, 14 Utah 2d at 295–96, 383 P.2d at 405–06 (1963) (price fixing), unless those means consist of constitutionally protected activity, like the exercise of First Amendment rights. *NAACP v. Claiborne Hardware Co.*, —— U.S. ——, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). "Commonly included among improper means are violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood." *Top Service Body Shop, Inc.*, 582 P.2d at 1371 & n. 11. Means may also be improper or wrongful because they violate "an established standard of a trade or profession." *Id.* at 1371.

[20] By forcing Isom to defend what appear to have been two groundless lawsuits, the Leigh Corporation was clearly employing an improper means of interference with Isom's business. Such use of civil litigation as a weapon to damage another's business, besides being an intolerable waste of judicial resources, may give rise to independent causes of action in tort for abuse of process and malicious prosecution. *Crease v. Pleasant Grove City*, 30 Utah 2d 451, 455, 519 P.2d 888, 890 (1974) (abuse of process); *Baird v. Intermountain School Federal Credit Union*, Utah, 555 P.2d 877, 878 (1976) (malicious prosecution); *Johnson v. Mount Ogden Enterprises, Inc.*, 23 Utah 2d 169, 169–73, 460 P.2d 333, 334–46 (1969) (malicious prosecution); W. Prosser, *Handbook of the Law of Torts* §§ 120, 121 (4th ed. 1971). The jury's verdict can therefore be sustained on the ground that the Leigh Corporation intentionally interfered with Isom's economic relations by improper means.

There is also another basis for affirming that verdict on the basis of improper means.

[21, 22] A deliberate breach of contract, even where employed to secure economic advantage, is not, by itself, an "improper means." Because the law remedies breaches of contract with damages calculated to give the aggrieved party the benefit of the bargain, there is no need for an additional remedy in tort (unless the defendant's conduct would constitute a tort independent of the contract).[10]

[23, 24] Neither a deliberate breach of contract nor an immediate purpose to inflict injury which does not predominate over a legitimate economic end will, by itself, satisfy this element of the tort. However, they may do so in combination. This is so because contract damages provide an insufficient remedy for a breach prompted by an immediate purpose to injure, and that purpose does not enjoy the same legal immunity in the context of contract relations as it does in the competitive marketplace. As a result, a breach of contract committed for the immediate purpose of injurying the other contracting party is an improper means that will satisfy this element of the cause of action for intentional interference with economic relations.

Two cases illustrate how breach of contract (or lease), when done with a purpose to injure, satisfy this element of the tort. In both cases, the defendant committed a breach not just to obtain relief from its obligation under the contract or lease (for which contract damages would have made the plaintiff whole), but to achieve a larger advantage by injuring the plaintiff in a manner not compensable merely by contract damages. In both cases, the defendant ruined the plaintiff's business by its breach, and in both cases the plaintiff was given substantial damages for the tort of interference with prospective economic relations.

In *Buxbom v. Smith*, 23 Cal.2d 535, 145 P.2d 305 (1944), a retail grocery chain contracted with the plaintiff to publish and distribute a "shopping news." In order to do so, the plaintiff abandoned his printing customers and expanded his distribution organization. After becoming the plaintiff's sole customer and acquiring complete knowledge of his business, the retailer deliberately breached its contract in order to ruin the plaintiff's business by cutting off the work required to sustain it and then hired his employees. The California Supreme Court affirmed a verdict for the plaintiff, awarding damages for breach of contract and additional damages for "tortious interference with his business" in order to give him "complete recompense for his combined injuries . . . ." *Id.* at 546, 145 P.2d at 310. The gravamen of the tort, the court explained, was the defendant's breaching its contract with plaintiff as a means of acquiring plaintiff's employees:

> Although defendant's conduct may not have been tortious if he had merely broken the contract and subsequently decided to hire plaintiff's employees, an additional factor is present in this case. From the evidence the trial court could reasonably infer that *the breach, at the*

10. Likewise, for reasons discussed in the preceding section, a party whose *immediate* purpose is to inflict injury does not satisfy the element of "improper purpose" so long as the *long-range* or predominant purpose is to further a legitimate economic end.

time it was made, was intended as a means of facilitating defendant's hiring of plaintiff's employees. A breach of contract is a wrong and in itself actionable. It is also wrongful when *intentionally utilized as the means of depriving plaintiff of his employees,* and, in our opinion, constitutes an unfair method of interference with advantageous relations within the rule set forth above. [Emphasis added.]

Id. at 548, 145 P.2d at 311.

In *Cherberg v. Peoples National Bank of Washington,* 88 Wash.2d 595, 564 P.2d 1137 (1977), a lessor deliberately breached its duty to repair a structurally unsound wall on the leased premises in order to destroy the restaurant business of a lessee who had leased a portion of the premises. The lessor's purpose was to retake the entire building as soon as possible, demolish the structure, and erect a more profitable building. The jury gave a verdict of $42,000 against the lessor. Apart from the $3,100 damages for breach of the lease (economic losses from temporary closure of the restaurant business), this verdict represented a recovery of damages for inconvenience, discomfort, and mental anguish for "the tort of intentional interference with business expectancies." The Washington Supreme Court sustained the verdict in an opinion that squarely relies on the combination of improper means and improper purpose in defendant's deliberate breach for the purpose of injuring the plaintiff.

After reviewing cases holding that a breach of covenants may also give rise to liability in tort, the court summarized:

> It appears to be the general view that, in those instances in which the conduct of the breaching party indicates a motive to destroy some interest of the adverse party, a tort action may lie and items of damage not available in contract actions will be allowed.

Id. at 603, 564 P.2d at 1143. The court then acknowledged the "separate line of cases" holding that a breach of duty under a contract or a lease does not constitute an independent tort even where it interferes with the injured party's business relations. The court explained as follows:

> The distinguishing feature between the two lines of cases would seem to be whether the interference with business relations was a mere incidental consequence of the breach or a motive or purpose therefor.

Id. at 604, 564 P.2d at 1143. In *Cherberg,* the court found that the defendant had breached its lease and interfered with the plaintiff's business not for the "privileged" reason of escaping from an unsatisfactory return on its investment in the leased premises (upon payment of contract damages), but for the impermissible purpose of injuring the tenant in order to secure an advantage beyond the scope of the lease:

> There is, instead, evidence in the record from which the jury could have inferred the lessor used the condition of the wall as a means to oust the petitioners and gain possession of the leased premises in order that the lessor might put those premises to a different and perhaps considerably more profitable use. *Proof of a breach based upon such a motive* demonstrates a failure to make a good faith effort to meet obligations under the lease and *may give rise to liability in tort.* [Emphasis added.]

Id. at 605, 564 P.2d at 1143–44.

As stated by the court in *Schisgall v. Fairchild Publications, Inc.,* 207 Misc. 224, 232, 137 N.Y.S.2d 312, 319 (1955):

> If the defendant acted merely as a contracting party (at legal liberty perhaps to breach its agreement upon payment of damage), that is one thing. But if the defendant went further, and *acted with intent to inflict injury beyond that contemplated as a result of the mere breach of contract,* I would hold that the contract does not grant the defaulter immunity from tort liability. [Emphasis added.]

[25] In the case at bar, the Leigh Corporation breached its contract in various ways.

It breached its implied duty to exercise all of its rights under the contract reasonably and in good faith. *Cahoon v. Cahoon,* Utah, 641 P.2d 140, 144 (1982); *Rio Algom Corp. v. Jimco Ltd.,* Utah, 618 P.2d 497, 505 (1980); *Ferris v. Jennings,* Utah, 595 P.2d 857, 859 (1979). Leigh's unexplained refusal to approve Isom's prospective business partners without consideration of their merits indicates an absence of good faith and provides evidence that the Corporation's breach was intended to deprive Isom's business of additional capital and valuable expertise which (at least with regard to Talbot) Leigh himself had repeatedly urged Isom to acquire. Similar refusals to approve prospective subtenants under a contract clause in order to injure the tenant's business have been held to constitute tortious interference with economic relations. *Homa-Goff Interiors, Inc. v. Cowden,* Ala., 350 So.2d 1035 (1977); *Nizzo v. Amoco Oil Co.,* Fla.Dist.Ct.App., 333 So.2d 491 (1976). In addition, Leigh, his wife, and his bookkeeper continually interrupted sales activities with their visits, letters, threats, and demands, causing customers to comment and complain and sometimes to leave. Although the contract entitled the Corporation, as lessor and secured party, to reasonable supervision of Isom's business, the jury had sufficient evidence to conclude that this conduct constituted an unreasonable exercise of contract rights and/or was done in bad faith for the purpose of injuring Isom's business relations.

The Corporation also breached its contractual duty by refusing Isom's tender of the balance of the purchase price and by refusing to appoint an appraiser to establish a price for the sale of the entire building, thereby preventing Isom from exercising his purchase option. There is evidence of Leigh's purpose in the fact that he openly regretted his contract with Isom and frequently expressed his desire to "get Richard out" of the business and building. Furthermore, he continually contacted prospective buyers for the building, even approaching two of Isom's employees for this purpose.

All of the above provide substantial evidence from which the jury could have concluded that the Corporation breached its express and implied contractual duties for the purpose of ruining Isom's business and obtaining possession of the building in order to sell it more profitably elsewhere. By themselves, the Corporation's breaches would not satisfy the requirement of "improper means," but they could do so when coupled with the improper purpose of injuring Isom. In combination, a breach of contract and an intent to injure satisfy the improper means requirement for the cause of action for intentional interference with prospective economic relations.

F. Summary

In defining the tort of intentional interference with prospective economic relations, we reject the two extremes of the prima facie tort and the balancing-of-factors approach. Instead, we adopt the Oregon definition, under which the plaintiff must prove that the intentional interference with existing or potential economic relations that caused injury to the plaintiff was done for an improper purpose or by improper means. The jury instructions in this case, which in effect required a finding that the Corporation's conduct was "wrongful or malicious," were sufficiently in harmony with this definition to permit the jury to return a verdict under it. There was sufficient evidence of intentional interference and causation.

To satisfy the alternative of improper purpose, the defendant's purpose to injure the plaintiff must predominate over all other purposes, including the long-range purpose of achieving some personal economic gain. Under this definition, the evidence is insufficient to justify a verdict against Leigh Corporation on the basis of improper purpose. Improper means refers primarily to actions that are contrary to law, such as violations of statutes, regulations, or recognized common-law rules. The Leigh Corporation's pursuit of two groundless lawsuits against Isom was an improper means. A deliberate breach of contract for the purpose of injuring the contracting party is also an improper means, and there is also sufficient evidence to sustain the jury's verdict on that basis.

IV. REDUCTION OF PUNITIVE DAMAGES

26] Leigh Furniture challenges the propety of any damages on Isom's counterim, as discussed earlier, but advances no gument against the $35,000 verdict on nitive damages in particular. Isom's ss-appeal challenges the remittitur by ich the district court reduced the puni- e damages in reliance on the rule that e amount of punitive damages "should linarily bear some reasonable relation to e actual damages sustained." *Holdaway Hall*, 29 Utah 2d 77, 79, 505 P.2d 295, 296 973). Following the "guide" of *Kesler v. gers*, Utah, 542 P.2d 354 (1975), and *ince v. Peterson*, Utah, 538 P.2d 1325 975), where this Court reduced punitive mages to an amount equal to twenty and ghteen percent of the compensatory damges, respectively, the district court found at $13,000 (exactly twenty percent of the mpensatory damages awarded by the jury this case) would adequately accomplish e purpose of punitive damages, and reced them by remittitur to that amount. om asserts error in this mechanical appliction of a fixed ratio as a basis for such duction. We agree.

The purposes of punitive damages are ell stated in *Kesler v. Rogers, supra:* They are: a punishment of the defendant for particularly grievous injury caused by conduct which is not only wrongful, but which is wilful and malicious so that it seems to one's sense of justice that mere recompense for actual loss is inadequate and that the plaintiff should have added compensation; and that the defendant should suffer some additional penalty for that character of wrongful conduct; and also that such a verdict should serve as a wholesome warning to others not to engage in similar misdoings.

42 P.2d at 359. *Accord Branch v. Western Petroleum, Inc.*, Utah, 657 P.2d 267 (1982). As reflected in this statement of purpose and in numerous other authorities, punitive damages are awarded "where the nature of the wrong complained of . . . *goes beyond merely violating the rights of another in that it is found to be willful and malicious,*" *Elkington v. Foust*, Utah, 618 P.2d 37, 41 (1980) (emphasis added), or a result of "reckless indifference toward, and disregard of" the rights of others. *Branch v. Western Petroleum, Inc., supra.*[11]

[27] We have recently had occasion to review the factors that the fact-finder should consider in determining the amount of punitive damages. *See First Security Bank of Utah, N.A. v. J.B.J. Feedyards, Inc.*, Utah, 653 P.2d 591 (1982). For purposes of this case, we need only reemphasize that the amount of compensatory damages is only one of a significant number of factors to be considered in that determination. *Terry v. Zions Cooperative Mercantile Institution*, Utah, 605 P.2d 314, 328 (1979), modified on another point, 617 P.2d 700 (1980). The district court's reduction of punitive damages solely on the basis of that factor was therefore in error.

[28–30] The jury (or other fact-finder) has "a broad discretion" in weighing the various factors and arriving at its determination of an appropriate award of punitive damages. *Ostertag v. La Mont*, 9 Utah 2d 130, 133, 339 P.2d 1022, 1024 (1959). The standards that guide a court in reviewing the jury's determination are also reviewed and reaffirmed in *First Security Bank v. J.B.J. Feedyards, supra*, and need not be repeated here. This jury found $65,000 compensatory damages and $35,000 punitive damages. We find nothing in the ratio between those two amounts, or in the other circumstances of this case, to persuade us that the award of punitive damages was "so flagrantly excessive and unjust as to indicate a disregard of the rules of law by which damages are regulated," or "so grossly excessive and disproportionate to the injury" or "so excessive as to be shocking to one's conscience and to clearly indicate passions, prejudice or corruption on the part of the jury." *First Security Bank v. J.B.J. Feedyards, supra*, at 11.[12]

The record contains abundant evidence that Leigh Furniture interfered with Isom's economic relations by improper means, including breaching its contract with the intent to injure Isom, a circumstance from which the jury could infer sufficient malice to justify their award of punitive damages. Economic motives will not insulate a defendant from liability for punitive damages where he acts maliciously. *Fury Imports, Inc. v. Shakespeare Co.*, 554 F.2d 1376 (5th Cir.1977), *cert. denied*, 450 U.S. 921, 101 S.Ct. 1369, 67 L.Ed.2d 349 (1981); *Cherne Industrial, Inc. v. Grounds & Associates, Inc.*, Minn., 278 N.W.2d 81 (1979).

On Isom's cross-appeal, the judgment is modified to reinstate the full amount the jury awarded as punitive damages.

As modified in respect to punitive damages, the judgment on the verdict for defendant Isom is affirmed. Costs to respondent.

HALL, C.J., STEWART, J., and VeNOY CHRISTOFFERSEN, District Judge, concur.

DURHAM, J., does not participate herein.

HOWE, Justice (concurring):

I concur in the majority opinion but express a reservation as to the following sentence in Part II:

> [W]here more than one cause of action has been submitted to a jury and where one of those causes of action was error-free, supported by substantial evidence, and an appropriate basis for the general verdict, the judgment on that verdict will be affirmed, even though the evidence was insufficient to sustain the verdict on one of the other causes of action submitted.

Under my view of the instruction given the jury, set out in Part III B, it is unnecessary to take any position on the principle above quoted because that principle is not involved in this case. Even though the instruction instructed jointly on the tort of interference with contract and the tort of interference with prospective economic relations, it did not offer alternatives or choices to the jury as to the separate torts or theories of recovery. The jury could not have been conscious that they were being instructed on two separate torts. They were not told that they could choose between them. I agree with the majority opinion that the instruction properly defined the tort of interference with prospective economic relations and we must presume that the jury followed the instruction in finding liability against the defendant. The fact that the instruction may have also defined another tort which does not lie in this case is of no consequence. There was competent evidence adduced to support the elements of interference with prospective economic relations as illustrated by the cases of *Cherberg v. Peoples National Bank of Washington*, 88 Wash.2d 595, 564 P.2d 1137 (1977) and *Buxbom v. Smith*, 23 Cal.2d 535, 145 P.2d 305 (1944). It should be noted that in both of those cases one contracting party committed that tort on the other contracting party. No third party was involved.

While I recognize that the principle quoted above, which is called the "two issue rule," is supported by the cases from the

1. We do not address the question of whether the theory of punitive damages would permit their award for an intentional tort, one of whose elements is malice (improper purpose). That circumstance is not before us.

12. Where appropriate, we have affirmed punitive damage awards much in excess of the amount of compensatory damages awarded. *See Elkington v. Foust*, Utah, 618 P.2d 37, 41 (1980) (compensatory $12,000; punitive $30,000); *Powers v. Taylor*, 14 Utah 2d 152, 379 P.2d 380 (1963) (compensatory $350 to one plaintiff and $1,000 to another; punitive $1,500); *Ostertag v. La Mont*, 9 Utah 2d 130, 339 P.2d 1022 (1959) (actual damages $140; punitive $860); *Evans v. Gaisford*, 122 Utah 156, 161 64, 247 P.2d 431, 433 35 (1952) (general and special damages $900; punitive $1,000); *Falkenberg v. Neff*, 72 Utah 258, 270 72, 269 P. 1008, 1013 (1928) (actual damages $362.50; punitive $1,500); and cases cited with approval in *Holdaway v. Hall*, 29 Utah 2d 77, 79 80, 505 P.2d 295, 296 (1973). Moreover, in at least one case, we have held that punitive damages may be awarded where only equitable relief was granted and no compensatory damages were awarded. *Nash v. Craigco, Inc.*, Utah, 585 P.2d 775 (1978).

jurisdictions cited in the majority opinion, there is a contrary point of view exemplified by the following cases: *Bredouw v. Jones*, Okl., 431 P.2d 413 (1967); *Heinen v. Heinen*, 64 Nevada 527, 186 P.2d 770 (1947); *Martin v. Northern Pac. Ry.*, 51 Mont. 31, 149 P. 89 (1915). Apparently this Court has not heretofore decided this question and I prefer to reserve an expression of opinion on it until it is squarely before us. See *Ivie v. Richardson*, 9 Utah 2d 5, 336 P.2d 781 (1959) and *Watters v. Querry*, Utah, 588 P.2d 702 (1978) for examples of a somewhat similar situation arising because of conflicting jury instructions.

98 Wash.2d 569

Melvin M. BELLI, Petitioner,

v.

Donald R. SHAW and Patricia Shaw, husband and wife; and Walter B. Dauber and Joan Dauber, husband and wife, Respondents.

No. 48084-2.

Supreme Court of Washington, En Banc.

Jan. 13, 1983.

In a suit involving a dispute over attorney fees, the Yakima County Superior Court, Ted Kolbaba, J., rendered judgment for defendants notwithstanding a verdict for plaintiff. Plaintiff appealed. The Court of Appeals, 29 Wash.App. 875, 631 P.2d 980, affirmed. Appeal was taken. The Supreme Court, Pearson, J., held that where there was undisputed evidence that, before the second trial in a defamation action, the client entered into a contingent fee arrangement with two attorneys which excluded the plaintiff, the plaintiff was not entitled to recover attorney fees.

Affirmed.

Dore, J., dissented with opinion in which Dimmick and Rosellini, JJ., joined.

1. Attorney and Client ⇐76(1)

Where, before second trial in defamation action, client entered into contingent fee agreement with two attorneys which excluded plaintiff, that direct repudiation by client of his contract with plaintiff constituted discharge of plaintiff from employment.

2. Attorney and Client ⇐134(1)

Attorney discharged before completion of undertaking for which he was engaged may recover from his client reasonable compensation for professional services actually rendered.

3. Attorney and Client ⇐76(1)

Unlike general contract law, under contract between attorney and client, client may discharge attorney at any time with or without cause.

4. Attorney and Client ⇐76(1)

Ordinarily, no special formality is required to discharge attorney and any act of client indicating unmistakable purpose to sever relations is sufficient.

5. Attorney and Client ⇐76(1)

Employment of other counsel, which is inconsistent with continuance of former relationship, shows unmistakable purpose to sever attorney and client relationship.

6. Attorney and Client ⇐134(1)

Plaintiff could not recover pursuant to fee agreement allegedly made in 1959 with former partner of firm after client's contract with plaintiff was repudiated.

7. Attorney and Client ⇐134(1), 151

Plaintiff could not recover attorney fees pursuant to "forwarding fee" arrangement with another attorney where there was no evidence that client authorized plaintiff's continued participation in case after first trial in defamation action and plaintiff's involvement after that trial was minimal at most. CPR DR 2-107.

James Hurley, Yakima, for petitioner.

John Gavin, Rodney Smith, Yakima, Law Offices of Melvin Belli, Daniel Smith, San Francisco, Cal., for respondents.

PEARSON, Justice.

Plaintiff Melvin Belli appeals a Court of Appeals decision affirming a judgment notwithstanding the verdict in his action for attorney fees. Plaintiff brought this action in 1977 against defendants, partners in a Yakima law firm, claiming $50,000 in attorney fees pursuant to a fee agreement allegedly made in 1959 with J.P. Tonkoff, a former partner in the Yakima firm. The jury awarded plaintiff $50,000, but the trial court entered judgment notwithstanding the verdict. The court concluded as a matter of law there was not sufficient evidence of a fee agreement which would entitle

Tab V

Ronald Dean Lancaster, pro se.

David L. Wilkinson, Kimberly Hornak, Salt Lake City, for defendants and respondents.

PER CURIAM:

Plaintiff filed, in *propria persona*, a petition for post-conviction relief in the trial court with respect to his guilty plea to and subsequent conviction of second degree murder. The trial court dismissed the petition as inappropriate, as plaintiff had not brought a motion to withdraw his guilty plea and a collateral attack under rule 65B of the Utah Rules of Civil Procedure was therefore not permissible. We reverse and remand for entry of findings on the merits.

In response to plaintiff's petition, the State brought a motion to dismiss on the ground that under the rationale of *State v. Gibbons*, 740 P.2d 1309 (Utah 1987), plaintiff was precluded from bringing a motion for post-conviction relief until he had first brought a motion to set aside his guilty plea. The trial court adopted that rationale in its order denying writ of habeas corpus, and the State repeats it before this Court in challenging the merits of plaintiff's habeas corpus petition.

State v. Gibbons is inapposite here. Gibbons pleaded guilty to several charges and then appealed *directly* after the trial court had sentenced him to consecutive terms of imprisonment. He did not file a motion to withdraw his guilty plea before perfecting his appeal, and the State argued that this Court should decline to consider the guilty plea issue because it was not raised below, 740 P.2d at 1311. This Court declined to follow the State's request and remanded the case to enable Gibbons to file a motion to withdraw his guilty plea, retaining jurisdiction over the case for further action. *State v. Gibbons* did not represent a *collateral* attack on the guilty plea.

Conversely here, plaintiff filed a post-conviction petition to challenge the validity of his guilty plea some nine years after the time for a direct appeal had run. It appears from his handwritten pleadings that he was originally charged with first degree murder, but pleaded to second degree murder when the prosecution was unable to prove the aggravating circumstances with which he had been charged. In his habeas corpus petition, plaintiff appears to allege that he thought he had pleaded to "unintentional murder" and that he should have been sentenced to one to fifteen years' imprisonment instead of five years to life. Plaintiff stated that he was innocent of knowingly and intentionally committing the offense and was therefore unlawfully imprisoned and that he had been denied due process and effective assistance of counsel. In addition, plaintiff challenged the constitutionality of the statutes under which he was charged and sentenced.

This Court has repeatedly stated that habeas corpus is not a substitute for and cannot be used to perform the function of regular appellate review. *Porter v. Cook*, 747 P.2d 1031, 1032 (Utah 1987); *Codianna v. Morris*, 660 P.2d 1101, 1104 (Utah 1983); *Martinez v. Smith*, 602 P.2d 700, 702 (Utah 1979). But it has also recognized that review by habeas corpus is appropriate in unusual circumstances to assure fundamental fairness and to reexamine a conviction when the nature of the alleged error is such that it would be unconscionable not to reexamine. *Codianna*, 660 P.2d at 1115 (Stewart, J., concurring in result). Moreover, rule 65B(i) of the Utah Rules of Civil Procedure specifically provides that a prisoner who asserts a substantial denial of his constitutional rights "may institute a proceeding under this rule." See also *Martinez v. Smith, supra*, where this Court held a petition for habeas corpus reviewable without first requiring the withdrawal of a guilty plea. Given the allegations plaintiff made in his petition, it was therefore error for the trial court to dismiss the petition without granting a hearing.

Without the benefit of findings, this Court is in no position to review the validity of plaintiff's claims. It is safe to assume that trial courts prefer to give short shrift to the many post-conviction petitions which they decide lack merit. It is equally safe to assume that an appellate court will be unable to review the case in a vacuum and will have to remand it where no rationale for dismissal or denial is given. A simple finding, on the other hand, will suffice in the vast majority of cases to limit the judicial process to one review. The trial court's basis for dismissing plaintiff's petition in this case was erroneous, as stated. The record is too sparse for this Court to determine whether the issues raised by the pleadings were legal, so that it could affirm the trial court on the ground that the claims were properly resolved as a matter of law. *See Gonzales v. Morris*, 610 P.2d 1285, 1286 (Utah 1980). Instead, it appears that plaintiff claims irregularity in the reception of his guilty plea, an issue that should have been considered by the trial court.

The case is remanded for entry of findings on the merits.

LLOYD'S UNLIMITED, a corporation, Plaintiff and Appellant,

v.

NATURE'S WAY MARKETING, LTD., a corporation, Defendant and Respondent.

No. 860311-CA.

Court of Appeals of Utah.

April 21, 1988.

Middleman brought action for breach of contract against supplier, seeking accounting and judgment for sums due under contract. The Third District Court, Salt Lake County, Dean E. Conder, J., entered judgment in favor of supplier, and middleman appealed. The Court of Appeals, Greenwood, J., held that: (1) trial court erred in denying middleman's motion to amend to include cause of action for reformation of contract so the commission schedules could be changed; (2) middleman was not precluded from seeking reformation of commission schedule under contract; and (3) middleman was not entitled to recover costs of deposing two witnesses and serving subpoena on one witness.

Vacated and remanded.

1. Pleading ⇐248(4)

In breach of contract action in which middleman who sold "coffee extender product" for supplier sought to recover commissions under contract with supplier, trial court erred in denying middleman's motion to amend to include cause of action for reformation of contract so the commission schedules could be changed; issue of commission schedules was not raised until second day of trial and court did not allow middleman to submit evidence on issue of parties' intent in entering contract.

2. Reformation of Instruments ⇐25

Middleman who sold "coffee extender product" for supplier was not precluded from seeking reformation of commission schedule under contract with supplier because contract included integration clause.

3. Reformation of Instruments ⇐36(1), 45(1)

Reformation of contract is equitable remedy which must be pled with particularity and established by clear and convincing proof.

4. Costs ⇐176, 193

In middleman's action against supplier to recover commissions under contract with supplier, middleman was not entitled to recover costs of deposing two witnesses and serving subpoena on one witness. Rules Civ.Proc., Rule 54(d).

5. Costs ⇐207

Party claiming entitlement to cost of depositions has burden of demonstrating that depositions were reasonably necessary and whether that burden is met is within sound discretion of trial court. Rules Civ. Proc., Rule 54(d).

6. Appeal and Error ⇐984(1)

Trial court's ruling on whether to award party the costs of depositions is pre-

sumed correct and will not be disturbed unless it is so unreasonable as to manifest clear abuse of discretion. Rules Civ.Proc., Rule 54(d).

Kevin J. Sutterfield (argued), Leslie W. Slaugh, Ray G. Martineau, P.C., Provo, for plaintiff and appellant.

Terry M. Crellin (argued), M. Wayne Western, Thorpe, North & Western, Sandy, for defendant and respondent.

Before GREENWOOD, BILLINGS and BENCH, JJ.

OPINION

GREENWOOD, Judge:

Plaintiff, Lloyd's Unlimited (Lloyd's), initiated this action against defendant, Nature's Way Marketing, Ltd. (Nature's Way), for breach of contract, seeking an accounting and judgment for sums due under the contract. The court found that the parties had entered into a valid and enforceable contract and awarded Lloyd's $416.25. Lloyd's appeals, claiming that the court improperly denied its motion to amend the complaint to include a cause of action for reformation and that the trial court's findings of fact were clearly erroneous. Lloyd's requests modification of the lower court's award and entry of judgment against Nature's Way for $39,710.41. Alternatively, Lloyd's requests that the judgment be vacated and the case remanded. We reverse and remand.

FACTS

In early 1982, Lloyd Dowdle (Dowdle), president of Lloyd's, and Lynn Burningham (Burningham), president of Nature's Way, began negotiating terms of a contract involving a "coffee extender product" (product). The contract was to provide that Lloyd's would receive a commission from Nature's Way for product sold to Yurika Foods Corporation (Yurika) by Nature's Way in consideration of Lloyd's efforts in inducing Yurika to purchase and market the product. In early August 1982, Dowdle drafted a handwritten document which stated that Lloyd's would receive $1.00 commission for each pound of product sold. On August 11, 1982, after Dowdle and Burningham discussed the document, Dowdle crossed out the commission paragraph he had drafted and inserted a new schedule in the handwritten contract which, as found by the trial court, provided the following commission schedule:

1 unit—60 packets pack:	.25¢
1 unit—2 lb. bulk pack:	.35¢
1 unit—5 lb. bulk pack:	50¢
1 unit—37 lb. bulk pack:	$1.00

The parties then signed the agreement. Several days later, Dowdle's secretary typed the agreement from the handwritten version. The typewritten agreement set forth the same commission schedule as set out above except the commission on the 5 lb. bulk pack was .50¢ rather than 50¢. The typewritten agreement also repeated verbatim the following clause from the handwritten agreement: "This agreement contains the entire understanding of the parties hereto and may not be altered, amended, modified, or discharged in any way whatsoever except by subsequent agreement in writing by all parties hereto." The parties then signed the typewritten agreement and Nature's Way paid Lloyd's $500, representing commission earned from April 24, 1982 to August 1, 1982. The parties did not make a formal accounting of the sizes or amount of the product sold to earn the $500 commission.

Between August 1, 1982 and February 28, 1984, Nature's Way received more than $625,000 for product sold to Yurika but failed to pay any commissions to Lloyd's. Subsequently, Lloyd's initiated this action, alleging in paragraph 5 of its complaint that Nature's Way owed it commissions based on the following commission schedule:

60 packets pack:	$ .25
2 lb. bulk pack:	.35
5 lb. bulk pack:	.50
37 lb. bulk pack:	1.00

Nature's Way's answer to paragraph 5 stated "Defendant denies the validity of the agreement and therefore denies the allegations in paragraph 5 of the Plaintiff's complaint to the effect that defendant is

obligated or indebted to Plaintiff in any sum of money."

After two days of trial, the judge found the contract was enforceable and awarded commissions to Lloyd's based on the lesser commission amounts stated in the typewritten contract, rather than those set forth in Lloyd's complaint. Subsequently, Lloyd's filed a motion to amend its complaint to include a cause of action for reformation of the contract, stating that it was not aware until the second day of trial that Nature's Way contested the commission schedule Lloyd's had asserted in its complaint.

After both parties filed extensive memoranda and several post-trial motions, the court ruled that the typewritten agreement was a valid, integrated and enforceable contract, awarded Lloyd's $416.25, and denied the motion to amend the complaint. The court denied Lloyd's its requested costs incurred in taking Burningham's deposition and in serving Burningham with a subpoena.

On appeal, Lloyd's claims that: 1) the trial court erred in denying its motion to amend the complaint to include a cause of action for reformation; 2) the trial court erred in failing to award Lloyd's its costs of depositions and service of subpoenas; and 3) the trial court's findings of fact are not supported by the evidence.

I. MOTION TO AMEND COMPLAINT

A. Amendment of Pleadings

Lloyd's first contention is that the trial court erred in denying its motion to amend the complaint. Amendment of pleadings is specifically addressed in Utah R.Civ.P. 15(b), which states:

> [1] When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. [2] If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

There are two parts to Utah R.Civ.P. 15(b). *General Ins. Co. of Am. v. Carnicero Dynasty Corp.*, 545 P.2d 502, 505–06 (Utah 1976). Under the first part of the rule, it is mandatory for the trial court to grant leave to amend pleadings to conform to the evidence to include issues tried by the express or implied consent of the parties. *Poulsen v. Poulsen*, 672 P.2d 97, 99 (Utah 1983); *General Ins. Co.*, 545 P.2d at 505–06. The second part of the rule is permissive and allows the pleadings to be amended when evidence is objected to at trial on the ground that it raises issues not framed by the pleadings. *General Ins. Co.*, 545 P.2d at 506. Utah R.Civ.P. 8(b) states that "[w]hen a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder." Subsection (d) of the same rule further provides that "[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading."

The Utah Supreme Court discussed the proper application and purpose of the pleading rules in *Cheney v. Rucker*, 14 Utah 2d 205, 211, 381 P.2d 86, 91 (1963), as follows:

> They must all be looked to in the light of their even more fundamental purpose of liberalizing both pleading and procedure to the end that the parties are afforded the privilege of presenting whatever legitimate contentions they have pertain-

ing to their dispute. What they are entitled to is notice of the issues raised and an opportunity to meet them. When this is accomplished, that is all that is required. Our rules provide for liberality to allow examination into and settlement of all issues bearing upon the controversy, but safeguard the rights of the other party to have a reasonable time to meet a new issue if he so requests.

Accord Williams v. State Farm Ins. Co., 656 P.2d 966, 970–71 (Utah 1982).

B. Procedural Background

In order to properly assess the validity of the trial court's rulings, we must first provide a rather detailed description of the procedural history of this case.

The record reveals that proceedings in this matter focused on Lloyd's theory of lack of consideration, up until the second day of trial. As stated earlier, Nature's Way's answer to the complaint generally denied liability under the contract, without specifically addressing the commission rate amounts alleged in the complaint. The answer also included an affirmative defense of lack of consideration.[1] Prior to trial, Lloyd's filed a motion for partial summary judgment, seeking judgment in the sum of $31,545.64 plus accruing interest. The motion was supported by the affidavit of a certified public accountant which calculated the amount due under the contract utilizing the commission schedule as alleged in the complaint and invoices of sales made by Nature's Way to Yurika. Lloyd's memorandum in support of the motion and "Statement of Uncontested Facts" again set forth the same schedule as in the complaint. Nature's Way's memorandum in opposition to the motion for summary judgment states "Defendant has no objection to what plaintiff has set out as uncontested facts other than that important uncontested facts were omitted." The memorandum then sets forth additional "facts" but does not mention the commission rate amounts. The court denied the motion for summary judgment.

During the first day of trial, the parties addressed, almost exclusively, the question of what consideration Lloyd's was to provide in order to earn the commissions. Burningham testified that he expected Dowdle to do a lot of traveling to procure sales for Nature's Way, and that in regard to payment of Dowdle's travel expenses, "That's the reason why I offered the commission. And I offered that—I offered it to him because it would have been very lucrative for him."[1]

On the second day of trial, Burningham testified under direct examination as to what the contract said, as follows:

Q. What does it state will be payable for one unit of the two-pound bulk pack?

A. .25 cents.

Q. .25 cents?

A. That's correct.

Q. Quarter of a cent, I guess.

On cross examination, Lloyd's counsel began to question Burningham about the intent of the parties on the commission rate amounts. The trial court sustained Nature's Way's objection to such questioning.

After trial, but before the court entered its findings of fact and conclusions of law, Lloyd's filed a motion for an order granting leave to file an amended complaint to conform to the evidence to include a cause of action for reformation of the contract. Lloyd's also filed a post trial memorandum which included excerpts from the deposition of Burningham, as follows:

Q. Had you made commissions to Lloyd's ... you would pay him 35 cents for each two pound bulk pack?

A. Correct.

Q. Based on the 300 figure?

A. Correct.

Q. For the five pound bulk you would pay him 50 cents based on the 180 figure?

A. Correct.

Lloyd's also submitted Dowdle's affidavit which stated that he habitually noted decimal points erroneously, as was done on at least part of the handwritten agreement.

Several months after the trial, the court entered findings of fact, which included the following: the handwritten agreement executed by the parties had commission rates of .25¢, .35¢, 50¢, and $1.00; the typed agreement executed by the parties had commission rates of .25¢, .35¢, .50¢, and $1.00; and the intent of the parties with respect to commissions did not change between execution of the two agreements. Further, the court found that the parties had stipulated to the amount of product sold during the time in question. The court concluded that the typed contract was a valid, integrated and enforceable contract and entered judgment for $487.87 and costs of $138.77.

The court denied the motion to amend the complaint to include a cause of action for reformation.

C. Application of Law

In this case, when, on the second day of trial, Burningham first testified that the commission for a sixty pound bulk pack was a quarter of a cent, Lloyd's attorney did not object to the testimony on the ground that it was not within the issues framed by the pleadings. Therefore, because no objection was raised, we conclude that there was implied consent to trying of the issue and the first part of Rule 15(b) applies, allowing consideration of the issue. On the other hand, Lloyd's had notice of the issue of commission rates only on the second day of trial, and by the court's rulings, had no adequate opportunity to meet the issue. We, therefore, also find that it was an abuse of discretion to concomitantly disallow Lloyd's to respond to the newly raised issue, by the court's refusal to consider evidence of intent and denial of the motion to amend the complaint to plead reformation of contract. There was no evidence of prejudice which would result to Nature's Way and, indeed, amendment would allow realization of one of the criteria under Rule 15(b)—"presentation of the merits of the action."

[1] Consequently, we hold that the trial court erred in denying the motion to amend to include a cause of action for reformation of the contract where the issue of commission schedules was not raised until the second day of trial and where the court did not allow Lloyd's to submit evidence on the issue of the parties' intent in entering the contract. Because the motion to amend should have been granted, we reverse and remand for further proceedings on the reformation issue.

D. Reformation of Contract

[2, 3] We further note that the trial court apparently believed that the typewritten agreement could not, as a matter of law, be reformed, because of the integration clause included in the contract.[2] Reformation of a contract is an equitable remedy which must be pled with particularity and established by clear and convincing proof. *Briggs v. Liddell*, 699 P.2d 770, 772 (Utah 1985). The *Briggs* court stated:

> A contract may be reformed for either of two reasons. First, if the instrument does not embody the intentions of both parties to the contract, a mutual mistake has occurred, and reformation is appropriate. Second, if one party is laboring under a mistake about a contract term and that mistake either has been induced by the other party or is known by and conceded to by the other party, then the inequitable nature of the other party's conduct will have the same operable effect as a mistake, and reformation is permissible.

Id. at 772. Reformation has also been applied in instances of drafter error. "Reformation is clearly appropriate where there is a variance between the written deed and the true agreement of the parties caused by a draftsman." *Hottinger v. Jensen*, 684 P.2d 1271, 1273 (Utah 1984).

On remand, the court should allow Lloyd's to present whatever evidence it can muster to establish its right to reformation of the contract. Moreover, it is not pre-

1. This testimony strikes us as inconsistent with Nature's Way's contention that the agreement yielded commissions of only $416.25 over the time period in question.

2. The court may have believed reformation was not available for other reasons, but the integration clause was the only rationale mentioned by the court.

cluded from doing so by the integration clause included in the contract. An integration clause may prevent enforcement of prior or contemporaneous agreements on the same subject, but "does not prevent proof of fraudulent representations by a party to the contract, or of illegality, accident, or mistake.... [P]aper and ink possess no magic power to cause statements of fact to be true when they are actually untrue." *Corbin on Contracts*, § 578 at 405–07 (1960).

II. COSTS

[4–6] Lloyd's also contends that the court erred in failing to award it the costs of deposing Burningham and Webb and serving a subpoena on Burningham. Utah R.Civ.P. 54(d) provides that except as the rule otherwise provides, "costs shall be allowed as of course to the prevailing party unless the court otherwise directs...." The general rule is that under Utah R.Civ.P. 54(d) "costs" means those fees which are "required to be paid to the court and to witnesses...." *Frampton v. Wilson*, 605 P.2d 771, 774 (Utah 1980). However, the Utah Supreme Court has held that the expenses of taking depositions are also allowable as costs if they were reasonably necessary. *John Price Assoc., Inc. v. Davis*, 588 P.2d 713, 715 (Utah 1978). Deposition costs are generally allowed as necessary and reasonable "where the development of the case is of such a complex nature that discovery cannot be accomplished through the less expensive method of interrogatories, requests for admissions and requests for the production of documents." *Highland Constr. Co. v. Union Pac. R.R.*, 683 P.2d 1042, 1051 (Utah 1984). The party claiming entitlement to the costs of depositions has the burden of demonstrating that the depositions were reasonably necessary and whether that burden is met is within the sound discretion of the trial court. *Id.; First Sec. Bank of Utah N.A. v. Wright*, 521 P.2d 563, 567 (Utah 1974). The trial court's ruling on whether to award a party costs of depositions is presumed correct and will not be disturbed unless it is so unreasonable as to manifest a clear abuse of discretion. *First Sec. Bank*, 521 P.2d at 567. The Utah Supreme Court has declined to extend the rule, which allows recovery of the cost of taking a deposition, to expenses such as service of a subpoena. *Frampton*, 605 P.2d at 774.

Lloyd's claims that the depositions of Burningham and Webb were essential for the development and presentation of the case and that Webb's deposition was taken because both parties anticipated that Webb would be unavailable to testify at trial. In addition, Lloyd's argues that because portions of Burningham's depositions were used at trial, it should be awarded the costs of Burningham's deposition. Lloyd's also contends that it should have been awarded the costs of serving Burningham with a subpoena to insure his appearance at the deposition. Nature's Way had previously failed to appear at a hearing on a motion to compel discovery, and Lloyd's believed that the subpoena was necessary to secure Burningham's appearance at the deposition.

Nature's Way, to the contrary, argues that because Lloyd's did not use Webb's deposition at trial and did not publish Burningham's or Webb's deposition at trial, the court properly denied Lloyd's the costs of the deposition. Nature's Way also contends that Lloyd's could have avoided the cost of the subpoena by telephoning Nature's Way's attorney to see if the corporation would produce Burningham for a deposition, and, therefore, the trial court correctly denied Lloyd's the cost incurred in subpoenaing Burningham.

We find that, in view of these arguments, the trial court's decision to deny Lloyd's the costs of the two depositions was reasonable. Apparently, Lloyd's failed to prove that the deposition costs were reasonably necessary and could not be accomplished through less expensive means. Therefore, because the burden of proof was not met and because the trial court's decision was reasonable, we hold that the trial court did not abuse its discretion in denying Lloyd's the costs of taking the depositions.

We also hold that the trial court's decision to deny Lloyd's the cost of subpoenaing Burningham was not unreasonable, in light of *Frampton*, where the court declined to extend the rules for awarding deposition costs to expenses such as service of subpoenas and vacated the trial court's award of such costs. Therefore, we hold that the trial court did not abuse its discretion in refusing to award Lloyd's the costs of serving the subpoena.

III. FINDINGS

Lloyd's third claim of error is that the trial court's findings are not supported by the evidence. Because we hold that that the trial court erred in denying the motion to amend, we need not reach the issue of whether the findings are supported by the evidence.

The judgment of the trial court is vacated and the matter remanded for further proceedings in accordance with this opinion.

BILLINGS and BENCH, JJ., concur.

STATE of Utah, Plaintiff and Respondent,

v.

Dickie Lynn STUKES, Defendant and Appellant.

No. 880154–CA.

Court of Appeals of Utah.

April 22, 1988.

Following ruling of the Third District Court, Summit County, Pat B. Brian, J., on search issue, defendant filed petition for certificate of probable cause. The Court of Appeals held that petition failed to satisfy applicable requirements.

Petition denied.

Criminal Law ⇐1071

Petition for certificate of probable cause lacked required affidavit of counsel or memorandum of law supporting defendant's position that issues presented on appeal were novel or fairly debatable.

Bradley P. Rich, Yengich, Rich, Xaix & Metos, Salt Lake City, for defendant and appellant.

David L. Wilkinson, State Atty. Gen., Sandra L. Sjogren, Asst. Atty. Gen., for plaintiff and respondent.

Before JACKSON, ORME and GREENWOOD, JJ. (On Law and Motion).

MEMORANDUM DECISION

PER CURIAM:

This matter is before the court on a Petition for Certificate of Probable Cause. Appellant's counsel filed the petition on March 10, 1988. It was accompanied by a brief Memorandum of Points and Authorities, but was not supported by the affidavit of counsel required by *State v. Neeley*, 707 P.2d 647 (Utah 1985). The Utah Supreme Court set forth the rationale for the procedure mandated in *Neeley* as follows:

> The record of proceedings below is not available in this Court at the time such petitions are brought. In addition, the petitions filed by the defendants are generally conclusory and contain little information concerning the case. The attorney general, who is by law required to argue before this Court, is uninformed concerning the facts of the case or the proceedings taken in the court below and therefore finds it difficult to respond to petitions for certificates of probable cause. This Court is likewise uninformed concerning the record until oral argument. In order that this Court may make an informed decision in issuing cer-

Tab W

all witnesses who have not been examined. He *may* also cause the witnesses to be kept separate, and to be prevented from conversing with each other until they have all been examined. [Emphasis added.]

Thus there is vested in the trial judge a separate discretion on both whether to exclude the witnesses, and whether he should admonish them to keep apart and not talk to each other.

[3] We do not doubt that if there is some reason to exclude the witnesses, it would seem that in most instances the latter admonition should also be given. However, in this case, in addition to the fact that it was discretionary with the trial judge,[6] there are additional reasons why we do not regard the omission of the admonition as reversible error: (1) there was no request for such an admonition; and (2) there is no indication as to how whatever may have been discussed (which is not shown except in generality) would have had any adverse effect upon the defendant.

[4, 5] As to point (3): defendant attacks his conviction on the ground of variance between the charge as made against him and the proof as to the ownership of the meat in question: that the information stated it belonged to Gary Hill, whereas the evidence showed that it belonged to a partnership of Mr. Hill and a Mr. Grant Thompson. The reason this contention fails is that one who steals property has no standing to question the title of anyone in lawful possession from whom it is taken.[7] The court correctly stated to the jury that:

> * * * The state must establish either that Gary Hill was such owner, or that he had some kind of special ownership or special right of possession.[8]

[6] In defendant's point (4) he argues that although Mr. Hill testified that meat was missing from his plant, he could not say exactly the amount thereof nor exactly when it was taken; and that though Hill saw the meat and his labels thereon in the county jail, it was not proved to be the same meat taken from the defendants by Officer Julian. However, Mr. Hill identified the meat to the best of his ability from the photographs of the packages taken at the scene, and from the observations made of them at the county jail. Any lack of positiveness in his testimony could as well be regarded by the jury as indicating his honesty as it could in discrediting the evidence. In any event, the matter complained of by the defendant goes to the credibility of the State's evidence, and not to its competency. From that evidence, and the inferences that reasonably could be drawn therefrom, the jury could reasonably find, as its verdict indicated that it did: that the meat in question was stolen from the packing plant in Brigham City; that recently after its theft it was found in the possession of the defendant; that he made a false, and therefore ipso facto unsatisfactory, explanation of his possession, which facts justified the verdict of guilty of its theft.[9]

Affirmed. No costs awarded.

CALLISTER, C. J., and TUCKETT, HENRIOD and ELLETT, JJ., concur.

6. See State v. Kendrick, 239 Or. 512, 398 P.2d 471.

7. See People v. Edwards, 72 Cal.App. 102, 236 P. 911, 950; Borrelli v. State, 453 P.2d 312 (Okl.Cr.1969).

8. See also Sec. 77-21-17, U.C.A.1953, which states with respect to partnership property that: "* * * * it is sufficient to refer to or describe such property as belonging to *any one or more of such partners* * * *." (Emphasis added.)

9. Sec. 76-38-4, U.C.A.1953; State v. Potello, 40 Utah 56, 119 P. 1023; State v. Allred, 16 Utah 2d 41, 395 P.2d 535.

25 Utah 2d 310

The STATE of Utah, Plaintiff and Respondent,

v.

David Craig CARLSEN, Defendant and Appellant.

No. 11876.

Supreme Court of Utah.

Feb. 5, 1971.

Defendant was convicted before the First District Court, Cache County, Lewis Jones, J., of attempted second-degree burglary, and he appealed. The Supreme Court, Tuckett, J., held that where trial court directed clerk to furnish defendant true and complete copy of documents, minute entries and transcript of proceedings without cost to him and where defendant was notified that transcript filed in Supreme Court would be made available to him for purpose of aiding him in appeal, conviction for attempted second-degree burglary was not improper on ground that trial court failed to furnish defendant without cost copies of minute entries and transcript of proceedings of his trial.

Affirmed.

Criminal Law ⇐1077

Where trial court directed clerk to furnish defendant true and complete copy of documents, minute entries and transcript of proceedings without cost to him and where defendant was notified that transcript filed in Supreme Court would be made available to him for purpose of aiding him in appeal, conviction for attempted second-degree burglary was not improper on ground that trial court failed to furnish defendant without cost copies of minute entries and transcript of proceedings of his trial.

David Craig Carlsen, pro se.

Vernon B. Romney, Atty. Gen., Lauren N. Beasley, Asst. Atty. Gen., Salt Lake City, for plaintiff and respondent.

TUCKETT, Justice:

The defendant was found guilty of attempted second-degree burglary, and from the verdict and the judgment of the court sentencing the defendant to a term in the Utah State Prison he has appealed. The sole basis of the defendant's appeal is that the trial court failed to furnish him without cost copies of minute entries and a transcript of the proceedings of his trial. The record belies defendant's contention in that it shows that the court below did in fact make an order directing the clerk to furnish the defendant a true and complete copy of the documents, minute entries and a transcript of the proceedings without cost to the defendant. The record also shows that the defendant was notified that the transcript filed in this court would be made available to him for the purpose of aiding him in this appeal.

It appears that the defendant's contentions before this court are without merit and the verdict and judgment of the court below are affirmed.

CALLISTER, C. J., and HENRIOD, ELLETT and CROCKETT, JJ., concur.

25 Utah 2d 311

Barbara LYON, Plaintiff and Respondent,

v.

HARTFORD ACCIDENT AND INDEMNITY COMPANY and Yosemite Insurance Company, Defendants and Appellant.

No. 12068.

Supreme Court of Utah.

Feb. 9, 1971.

Injured passenger, after obtaining judgment against uninsured motorist and another for injuries sustained in motor vehicle collision, brought action to recover benefits under uninsured motorist coverage of two policies. The Third District Court,

Salt Lake County, Gordon R. Hall, J., entered judgment for the passenger. Her insurer appealed, and she cross-appealed. The Supreme Court, Callister, C. J., held that where policy contained uninsured motorist endorsement with limit of $20,000 per person but contained provision that the endorsement applied only in amount by which limit of liability exceeded applicable limit of liability of other similar insurance and where the passenger recovered under another policy containing $10,000 uninsured motorist endorsement, the former policy's excess-escape clause was effective and the passenger was only entitled to recover on the former policy the difference between limits of the policies' endorsements notwithstanding uninsured motorist statute, but that the passenger was entitled to interest on judgment on the policies only from time that judgment was rendered against uninsured motorist and another.

Judgment reversed and cause remanded with order to render judgment in accordance with opinion.

Henriod, J., did not participate herein.

1. Insurance ⇐531.3

Purpose of uninsured motorist statute is to provide protection only up to minimum statutory limits for bodily injuries and not to provide insured with greater insurance protection than would have been available had he been injured by insured motorist. U.C.A.1953, 41-12-5, 41-12-21.1.

2. Insurance ⇐531.3

Where one policy contained uninsured motorist endorsement with limit of $20,000 per person but contained provision that the endorsement applied only in amount by which limit of liability exceeded applicable limit of liability of other similar insurance and where passenger recovered under another policy containing $10,000 uninsured motorist endorsement the former policy's excess-escape clause was effective and the passenger was only entitled to recover on the former policy the difference between limits of the policies' endorsements notwithstanding uninsured motorist statute. U.C.A.1953, 41-12-5, 41-12-21.1.

3. Insurance ⇐532

Where insured's damages exceeded policy limits under uninsured motorist coverage and insurer was not subject to double exposure for the insured's medical expenses, the insurer was not entitled to set off amount that it had paid under medical payment coverage against amount that it was deemed liable to pay under uninsured motorist coverage under provision of policy which stated that insurer was not obligated to pay under uninsured motorist coverage that part of damage which represented expenses for medical services.

4. Insurance ⇐606(4)

Where insured remained uncompensated for her total damages, her insurer was not entitled to receive $2,000 paid into court by insurer of judgment debtor on basis of former insurer's right of subrogation for medical payments.

5. Insurance ⇐607.1(8)

Where insurer was not entitled to award from another insurer based on subrogation rights for medical payments, judgment for $500 attorneys' fees as former insurer's share of expenses in recovering the medical payments could not be sustained.

6. Interest ⇐39(2)

Where insurer's obligation to perform, under expressed terms of contract, did not arise until there was legal determination of liability of uninsured motorist and extent of damages sustained, insured was entitled to interest on judgment against the insurer under uninsured motorist provision only from time that judgment was rendered against uninsured motorist and another.

7. Insurance ⇐602.1

Insured was not entitled to damage for insurer's failure to bargain with her or settle her claim in connection with uninsured motorist.

Harold G. Christensen, of Worsley, Snow & Christensen, Salt Lake City, for defendants-appellant.

Robert M. McRae, of Hatch, McRae, Richardson & Kinghorn, Salt Lake City, for plaintiff-respondent.

David B. Dee and Leonard W. Burningham, Salt Lake City, Utah, Utah Trial Lawyers Assn., for amicus curiae.

CALLISTER, Chief Justice:

Plaintiff sustained serious injuries in a motor vehicle collision. She was a passenger in the automobile of one Martinez; Yosemite Insurance Company had issued a liability policy upon this vehicle which contained an uninsured motorist endorsement in accordance with Sec. 41-12-21.1, U.C.A.1953, as amended 1967. In a separate action plaintiff was granted a jury verdict of $70,830.75 against the operators of two other motor vehicles, who were deemed jointly and severally liable. One driver, Robert G. Butcher, was insured with Allstate, his coverage conformed to the statutory minimum as provided in Sec. 41-12-5, $10,000 for bodily injury or death to one person. The other driver, Scott G. Nickel, was an uninsured motorist.

Plaintiff was an insured under a policy issued to her father by Hartford Accident and Indemnity Company, which contained an uninsured motorist endorsement with a declared limit of $20,000 per person. In addition, plaintiff was covered under a medical expense provision. At the conclusion of the plaintiff's tort action, Allstate, the insurer of Butcher, tendered $10,000, the limit of its coverage. Plaintiff received $8,000; the other $2,000 was paid to the clerk of the court because Hartford asserted subrogation rights to the $2,000 that it had paid plaintiff under the medical expenses coverage.

Plaintiff initiated the instant action to recover the benefits under the uninsured motorist coverage of both the Yosemite and Hartford policies. The trial court awarded judgment to plaintiff against Hartford for $20,000, the face amount of the uninsured motorist coverage in the policy it had issued in which plaintiff was a named insured. Plaintiff was awarded judgment against Yosemite for $10,000, the maximum coverage contained under its uninsured motorist endorsement. In addition, plaintiff was awarded $500 for reasonable attorneys' fees incurred in assisting Hartford in the recovery of $2,000 medical payments from Allstate. Hartford was awarded the $2,000 under its subrogation rights for medical payments. The trial court awarded plaintiff interest from the day of her original judgment except for the $500 attorneys' fees. Hartford appeals, and plaintiff cross-appeals.

On appeal, Hartford asserts that under the terms of its policy its obligation to plaintiff cannot exceed $10,000, under its uninsured motorist coverage, which is the difference between the policy limits of Yosemite and Hartford. The Hartford policy provides:

> With respect to bodily injury to an insured while occupying an automobile not owned by the named insured, the insurance under Coverage D (Uninsured Motorists shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance.

In Russell v. Paulson[1] this court upheld the validity of an excess-escape clause contained in an uninsured motorist provision, wherein the insurer was obligated to pay only that amount by which the limits of its policy exceeded the limits of all other available insurance. In other words, where the insured is injured in a non-owned vehicle upon which there has been issued an uninsured motorist endorsement,

1. 18 Utah 2d 157, 417 P.2d 658 (1966).

he coverage to the insured under his poli-:y constitutes excess insurance.

Subsequent to the decision in Russell v. Paulson, the legislature enacted Sec. 41-12-21.1, U.C.A.1953, as amended 1967, which provides:

> Commencing on July 1, 1967, no automobile liability insurance policy insuring against loss resulting from liability imposed by law for bodily injury or death or property damage suffered by any person arising out of the ownership, maintenance or use of a motor vehicle, shall be delivered, issued for delivery, or renewed in this state, with respect to any motor vehicle registered or principally garaged in this state, unless coverage is provided in such policy or a supplement to it, in limits for bodily injury or death set forth in section 41-12-5, under provisions filed with and approved by the state insurance commission for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. * * *

Plaintiff convinced the trial court that Sec. 41-12-21.1 indicated a legislative intent to overrule the holding in Russell v. Paulson; she successfully contended that this excess-escape clause limited the protection afforded the insured in a manner contrary to the policy expressed by the legislature and was therefore invalid. Plaintiff's argument is sustained by case authority, for there has been a marked divergence of opinion among the judiciary as to the proper interpretation of these uninsured motorist statutes. The two views are succinctly expressed in 28 A.L.R.3d 551, 554 Anno: Uninsured Motorists—"Other Insurance":

> A number of courts have held that "other insurance" provisions, whether in the form of a "pro rata," "excess insurance," "excess-escape," or other similar clause, are invalid as a part of uninsured motorist protection, on the ground that the statute requiring every liability policy to provide this type of protection will not permit the insurer to provide in any way that the coverage will not apply where other insurance is also "available," despite the fact that the insured may thus be put in a better position than he would be in if the other motorist were properly insured. Other courts have stated, however, that the design and purpose of uninsured motorist statutes are to provide protection only up to the minimum statutory limits for bodily injuries, and not to provide the insured with greater insurance protection than would have been available had he been injured by an insured motorist, and have held such "other insurance" provisions are valid where they do not reduce coverage below the minimum statutory limits.

[1] The latter view appears to be in accord with this State's statutory scheme. Section 41-12-21.1 is part of the Motor Vehicle Safety Responsibility Act; the minimum limits of uninsured motorist coverage are correlated with the minimum limits of coverage required for an automobile liability policy under Sec. 41-12-5, U.C.A.1953.

In Tindall v. Farmers Automobile Management Corp.[2] the court rejected plaintiff's argument that an excess-escape clause contained in an uninsured motorist provision violated the Illinois uninsured motorist statute (paragraph 755(a) (Sec. 143a) of Chap. 73, Ill.Rev.Stat. (Ill.Ins. Code)). The court observed that the statutory provision was designed to promote and encourage protection complementary to that afforded by the financial responsibility act, thereby affording coverage to the same extent as would have been in effect if the tort-feasor had complied with the minimum requirements of the financial responsibility act.[3]

2. 83 Ill.App.2d 165, 226 N.E.2d 397, 28 A.L.R.3d 546 (1967).

In Martin v. Christensen,[4] this court held that the provisions of Sec. 41-12-21.1 did not preclude the application of a clause providing that if the company had issued more than one policy to the insured, the insurer would be liable only up to the maximum coverage of its highest limit of any one policy for any one accident or loss. This court cited as authority M. F. A. Mutual Ins. Co. v .Wallace[5] in its rejection of the argument of insured, that the statute fixed the minimum coverage under each policy separately; and, therefore, the insured was entitled to the maximum amount under both policies.

In 52 Virginia Law Review 538, 554-557 (1966), there is an incisive critique of the recent judicial trend of permitting the stacking of policies, i. e., the courts have allowed recovery up to the combined limits of each policy available to the injured insured by ruling that "excess" or "other insurance" clauses were invalid. The author asserts that the Uninsured Motorist Acts are not being applied in a manner which places the victim of an uninsured motorist upon an equal footing with the victim of an insured motorist. In reference to the Virginia Act, the author states:

> In these cases the courts have looked only to the number of policies available to pay the judgment obtained against the uninsured motorist. No thought has been given to the fact that the act was intended merely to fill, not overflow, an insurance vacuum. Surely the General Assembly did not intend to foster a scheme whereby the innocent victim of an *insured* motorist may be penalized. It seems more logical that it intended to guarantee a source from which an insured could recover his damages up to limits of $15,000/$30,000/$5,000 with respect to any accident.
>
> * * * * * *
>
> By their application of the Uninsured Motorist Act, the courts in many instances have placed the innocent victim of an uninsured motorist in a superior position to that which he would have occupied if his wrongdoer had had liability coverage. The pendulum has made the full swing. Before the enactment of the Uninsured Motorist Act, one who had taken pains to protect the public against the effect of his own negligence by carrying insurance was himself left unprotected against the effect of the negligence of an uninsured motorist. Today the same person, through his uninsured motorist endorsement, is usually better protected and procedurally is in a better position if the wrongdoer is uninsured.

[2] A careful review of the case law reveals that the better reasoned cases give effect to an excess-escape clause contained in an uninsured motorist endorsement. In the instant action, the trial court erred by its refusal to apply such a clause in Hartford's policy. Plaintiff is entitled to recover only the difference between the limits of the policies issued by Hartford and Yosemite, i. e., $10,000.

Defendant, Hartford, further contends that it is entitled to set off the $2,000 that it has paid under the medical payments coverage against the amount that it is deemed liable to pay plaintiff under the uninsured motorist coverage. Hartford cites the following provision in its policy:

> The company shall not be obligated to pay under Coverage D—Uninsured Mo-

3. Also see Harris v. Southern Farm Bureau Casualty Ins. Co., Ark., 448 S.W.2d 652 (1970); M.F.A. Mutual Ins. Co. v. Wallace, 245 Ark. 230, 431 S.W.2d 742 (1968); Jackson v. State Farm Mutual Automobile Ins. Co., La.App., 235 So. 2d 621 (1970); Long v. United States Fire Ins. Co., La.App., 236 So.2d 521 (1970); Maryland Casualty Co. v. Howe, 106 N.H. 422, 213 A.2d 420 (1965); contra, Morelock v. Millers' Mutual Ins. Assn., 125 Ill.App.2d 283, 260 N.E.2d 477 (1970), wherein the court, Appellate, 5th District, declined to follow the holdings of the other Illinois Appellate Courts.

4. 22 Utah 2d 415, 417, 454 P.2d 294 (1969).

5. Note 3, supra.

:orists that part of the damage which the insured may be entitled to recover from the owner or operator of an uninsured highway vehicle which represents expenses for medical services paid or payable under Coverage B—Medical Expense.

A similar provision was interpreted by ıe court in Taylor v. State Farm Mutual utomobile Ins. Co.[6] as follows:

> * * * we consider it to be designed to protect the insurance company from double exposure for medical payments. Thus, it prevents an insured whose medical expenses have been paid under the Medical Payments Coverage from collecting for those medical expenses once again, in the event that a judgment for general damages in his favor and against the insurance company under its Uninsured Motorist Coverage falls below the policy limits of that coverage. However, in a case such as Mr. Taylor's where the award for general damages exceeds the policy limits on Uninsured Motorist Coverage, the insurance company must pay its insured the full limits of the policy, in this case $5,000 regardless of what it has paid him under the Medical Payments Coverage. We are fortified in our interpretation of this amendment by the fact that this is the only just meaning that it could have. Mr. Taylor paid two separate premiums for two separate coverages. * * * To interpret the amendment as the company would have us do, would make the Medical Payment Coverage useless except in cases where the insured suffered physical injury as a result of his own negligence. * * *[7]

[3] In the instant action, plaintiff's damages exceeded the policy limits under the uninsured motorist coverage, and Hartford was not subject to double exposure for plaintiff's medical expenses. Under such circumstances, Hartford was not entitled to offset the medical payments against the uninsured motorist coverage.

Plaintiff in her cross-appeal asserts that the trial court erred in its award to Hartford the $2,000 paid into the court by Allstate under Hartford's right of subrogation for medical payments, when plaintiff's damages far exceed her recovery therefor.

> Subrogation springs from equity concluding that one having been reimbursed for a specific loss should not be entitled to a second reimbursement therefor. This principle has been accepted in the insurance field with respect to property damage, and with respect to medical costs by an impressive weight of authority. * * *[8]

The Hartford policy provides:

> In the event of any payment under Coverage B—Medical Expense of this policy, the company shall be subrogated to all the rights of recovery therefor which the injured person or anyone receiving such payment may have against any person or organization and such person shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. Such person shall do nothing after loss to prejudice such rights.

Since subrogation is an offspring of equity, equitable principles apply, even when the subrogation is based on contract, except as modified by specific provisions in the contract. In the absence of express terms to the contrary, the insured is entitled to be made whole before the insurer may recover any portion of the recovery from the tort-feasor.[9] If the one responsible has paid the full extent of the loss, the insured should not claim both sums, and the insurer may then assert its claim to subrogation.[10]

[4, 5] In the instant action, there are no terms in this general subrogation clause which would support Hartford's subrogation claim to the $2,000, while plaintiff remains uncompensated for her total damages. Furthermore, since Hartford is not entitled to the award, the judgment for $500 attorneys' fees as Hartford's share of expenses in recovering the medical payments cannot be sustained.

Plaintiff further asserts that since this is an action in contract between an insured and an insurer, she is entitled to interest from the date of her loss, the date of the accident, and not from the date she was granted judgment against the tort-feasors. The insurance contract provides:

> The company will pay all sums which the insured shall be *legally entitled to recover as damages* from the owner or operator of an uninsured motor vehicle. * * * [Emphasis added.]

[6] Since Hartford's obligation to perform, under the express terms of its contract with the insured, did not arise until there was a legal determination of the liability of the uninsured motorist and the extent of the damages sustained, the insured, plaintiff, is entitled to interest only from the time that judgment was rendered against the tort-feasors.

[7] Finally, plaintiff contends that the trial court should have awarded her damages for Hartford's failure to bargain with her or settle her claim. She concedes that there is no case in point but asserts that this court should analogize her situation to that where a liability insurer refuses in bad faith to settle a claim with third parties within the policy limits and a judgment in excess of the policy limits is rendered against the insured.[11] She reasons that by Hartford's failure to bargain, she was compelled to incur legal expenses for which she is entitled to be compensated.

Plaintiff's analogy is untenable because of the distinction in the relationship between a liability insurer and its insured and that between the insurer and its insured in connection with an uninsured motorist. In the former situation, the insurer must act in good faith and be as zealous in protecting the interests of the insured as it would be in regard to its own.[12] In the latter situation, the insured and the insurer are, in effect and practically speaking, adversaries.[13]

The judgment of the district court is reversed, and this cause is remanded with an order to render judgment in accordance with this opinion. Each party should bear its own costs.

TUCKETT, ELLETT and CROCKETT, JJ., concur.

HENRIOD, J., does not participate herein.

25 Utah 2d 319

James P. KNUCKLES, Plaintiff and Respondent,

v.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation, Defendant and Appellant.

No. 12254.

Supreme Court of Utah.

Feb. 5, 1971.

Action by insured against insurer for benefits under policy for loss of sight. The Seventh District Court, Grand County,

6. La.App., 237 So.2d 690, 693 (1970).

7. Also see Hutchison v. Hartford Accident & Indemnity Co., 34 A.D.2d 1010, 312 N.Y.S.2d 789 (1970).

8. State Farm Mutual Ins. Co. v. Farmers Exchange, 22 Utah 2d 183, 184, 450 P. 2d 458 (1969).

9. Providence Washington Insurance Co. v. Hogges, 67 N.J.Super. 475, 171 A.2d 120, 124 (1961); First National Bank of Lafayette v. Stovall, La.App., 128 So. 2d 712, 717 (1961); 46 C.J.S. Insurance § 1209, p. 155.

10. McConnell v. Conaway, 62 Ohio App. 335, 23 N.E.2d 970, 971 (1939).

11. Ammerman v. Farmers Ins. Exchange, 19 Utah 2d 261, 430 P.2d 576 (1967).

12. Ammerman v. Farmers Ins. Exchange, note 11, supra.

13. 7 Appleman, Insurance Law and Practice, 1970 Supp., § 4331, p. 128.

TAB X

imacy to bring him within the class of persons who are permitted to inherit by the law of the situs is a question, not of descent or distribution, but of personal status, and as such is governed by the personal law of the child, and the existence or acquisition of a legitimate status by the child's personal law will be given effect under the inheritance law of the situs (so long as such recognition does not violate the public policy of the forum or situs), as will the denial of such status.

And we think the eminent Prof. Beale in his "Conflicts of Laws," Vol. 2, sec. 304.1, p. 1033, reflects the letter and spirit of our conclusion and that of the A.L.R. citation above, when he said:

> If a bastard is legitimized by the law of the domicile, he may inherit, and if the law of the domicile finds him illegitimate he may not inherit even though by the law governing distribution he would inherit.

CALLISTER, C. J., and TUCKETT, J., concur.

CROCKETT, J., concurs in the result.

ELLETT, Justice (concurring in the result).

I concur in the result. However, I cannot see that the laws of Illinois have anything to do with the case. The deceased was a resident of Utah, and his property is in Utah. Therefore, we need only look to Utah law to see who takes.[1]

There is no question but what the mother of appellants was illegitimate under Utah law as well as under Illinois law. There is also no question about her being acknowledged by her natural father. The fact that the recognition occurred in Illinois is of no importance. The law is stated in 10 Am.Jur.2d Bastards § 159 as follows:

> . . . For purposes of inheritance, acknowledgment or recognition may be sufficient, although it took place in another state where the father resided at the time, and in which the son might have no such right to inherit . . . .

In Utah our statute[2] provides:

> Every illegitimate child is an heir of the person who acknowledges himself to be the father of such child, and in all cases is an heir of his mother; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock. . . .

If the estate of the father of the mother was being probated in Utah, these appellants would take the share which would belong to their deceased mother.[3] However, it is not the estate of her father but rather is that of her blood half brother, the legitimate son of her father, which is being probated.

The distribution of the estate must be made pursuant to Section 74-4-5, Subsection (4) or (6).

Subsection (4) reads:

> If there is neither issue, husband, wife, father nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children or grandchildren of any deceased brother or sister by right of representation.

Subsection (6) reads:

> If the decedent leaves neither issue, husband, wife, father, mother, brother nor sister, nor children or grandchildren of any deceased brother or sister, the estate must go to the next kin in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote.

Now, the appellants take only through their mother. If she could not take, then her daughters cannot take.

At common law illegitimate children could not inherit property.[4] The common law of England is the law of Utah except as it has been modified by statute; and while the statute permits the illegitimate child to inherit from its mother and from its father if he acknowledges the child to be his, the statute makes no provision for inheriting from the brothers and sisters who are legitimate children of their father.

Section 74-4-11, U.C.A.1953, seems to indicate a legislative intent that an illegitimate cannot inherit from collateral half blood relatives on the father's side. It provides that the property of an illegitimate child who dies intestate without leaving husband or wife or lawful issue will go to his mother or in case of her death to *her* heirs at law. This statute prevents the decedent from participating in the estate of his half sister, and it would seem that the legislature intended that she (or in case of her prior death, her descendants) should not be able to share in his estate.

The appellants, therefore, cannot take under Subsection (4), supra, a share of the decedent's property through their mother, nor can they take under Subsection (6) above for the reason that they are not recognized in law as the "next of kin." The term "next of kin" refers to nearest blood relatives who would take the personal estate of one who dies intestate[5] and does not include bastards.[6] Since their mother could not inherit any part of the estate of the decedent, the appellants likewise are precluded from inheriting and, therefore, cannot be considered as belonging to the class of "next of kin."

1. 23 Am.Jur.2d Descent and Distribution §§ 19 and 20.
2. Section 74-4-10, U.C.A.1953.
3. In re Garr's Estate, 31 Utah 57, 86 P. 757 (1906).
4. 2 Wendell's Blackstone Commentaries, page 286.
5. Ballentine Law Dictionary page 868.
6. 10 C.J.S. Bastards § 24.

29 Utah 2d 101

TRANSAMERICA INSURANCE COMPANY, a California corporation, Plaintiff and Appellant,

v.

Earl R. BARNES, Defendant and Respondent.

No. 12771.

Supreme Court of Utah.

Nov. 17, 1972.

Automobile liability insurer brought action to enforce its claimed right of subrogation to certain funds received by defendant in settlement of his tort action for personal injuries against third party. The Third District Court, Salt Lake County, Stewart M. Hanson, J., rendered summary judgment for defendant, and plaintiff appealed. The Supreme Court, Callister, C. J., held that where record was insufficient to indicate whether defendant who had received medical expense payments from insurer, was paid twice for his injuries and record was inadequate to establish who had greater equity and did not clearly establish that tort-feasors or their representatives had actual or constructive knowledge of insurer's right of subrogation, issues of fact were raised, precluding summary judgment for defendant.

Reversed and remanded for trial.

Tuckett, J., concurred in result.

Henriod, J., dissented and filed opinion.

Crockett, J., dissented and filed opinion.

1. Insurance ⇐606(4)

Where an automobile liability policy did not specify occupant of a vehicle being used by an insured as a "person insured," defendant, who was such a passenger, who had been paid by insurer under medical expense coverage and against whom insurer

subsequently brought action to enforce its claimed right of subrogation to funds received by defendant in settlement of his tort action for personal injuries against third party, was not an "insured" subject to insurer's subrogation rights under policy clause providing that insurer shall be subrogated to all insured's rights of recovery. (Per Callister, C. J., with one Justice concurring and one Justice concurring in the result.)

2. Insurance ⇐606(1)

Regardless of an express contract provision, an insurer may be entitled to subrogation. (Per Callister, C. J., with one Justice concurring and one Justice concurring in the result.)

3. Subrogation ⇐1

Equitable principles apply to subrogation. (Per Callister, C. J., with one Justice concurring and one Justice concurring in the result.)

4. Insurance ⇐606(1)

Insured is entitled to be made whole before insurer may recover any portion of insured's recovery from tort-feasor; if one responsible has paid full extent of the loss, insured should not claim both sums, and insurer may then assert its claim to subrogation. (Per Callister, C. J., with one Justice concurring and one Justice concurring in the result.)

5. Subrogation ⇐1

Subrogation is not a matter of right but may be invoked only in those circumstances where justice demands its application. (Per Callister, C. J., with one Justice concurring and one Justice concurring in the result.)

6. Subrogation ⇐1

Subrogation is not permitted where it will work any injustice to others. (Per Callister, C. J., with one Justice concurring and one Justice concurring in the result.)

7. Subrogation ⇐1

To entitle one to subrogation, the equities of one's case must be strong. (Per Callister, C. J., with one Justice concurring and one Justice concurring in the result.)

8. Subrogation ⇐1

The purpose of subrogation, as a creation of equity, is to effect an adjustment between parties so as to secure ultimately the payment or discharge of the debt by a person who in good conscience ought to pay for it. (Per Callister, C. J., with one Justice concurring and one Justice concurring in the result.)

9. Insurance ⇐606(10)

If third-party tort-feasor's settlement with person who had received payment from automobile liability insurer for medical expenses was intended to include the prior medical expenses paid for by insurer, two drafts should have been issued, one to insurer and person receiving benefits jointly and one to that person alone. (Per Callister, C. J., with one Justice concurring and one Justice concurring in the result.)

10. Insurance ⇐606(10)

If settlement by third-party tort-feasor with person who had received medical expense payments from automobile liability insurer was made with knowledge, actual or constructive, of insurer's subrogation right, such settlement and release was a fraud on insurer and would not affect insurer's right of subrogation as against tort-feasor or his insurer. (Per Callister, C. J., with one Justice concurring and one Justice concurring in the result.)

11. Judgment ⇐185.3(12)

Where record, in automobile liability insurer's action to enforce its claimed right of subrogation to certain funds received by defendant in settlement of his tort action for personal injuries against third party, was insufficient to indicate whether defendant, who had received medical expense payments from insurer, was paid twice for his injuries and record was inadequate to establish who had greater equity and did not clearly establish that tort-feasors or their representatives had actual or constructive knowledge of insurer's right of subrogation, issues of fact were raised, precluding summary judgment for defendant. (Per Callister, C. J., with one Justice concurring and one Justice concurring in the result.)

12. Insurance ⇐606(10)

If an insurer has had an opportunity to assert its subrogation rights to third-party tort-feasors who have entered into settlement with person against whom subrogation rights are claimed and insured has neglected to give notice or enforce its demands, it may be determined under such circumstances that insurer's rights in equity are equal or inferior to those of person against whom subrogation is claimed. (Per Callister, C. J., with one Justice concurring and one Justice concurring in the result.)

13. Equity ⇐54

Equity will not relieve one who could have relieved himself. (Per Callister, C. J., with one Justice concurring and one Justice concurring in the result.)

14. Insurance ⇐601.2

Insurer, to establish a superior equity against person who has received medical expense payments from insurer and thereafter recovered against third-party tort-feasors, and thus to be entitled to prevail in subrogation action, must present proof which establishes that damages recovered by defendant's settlement were the same or cover those for which defendant has already received indemnity from insurer; otherwise, receipt of payment from tort-feasor does not entitle insurer to return of payments made by it. (Per Callister, C. J., with one Justice concurring and one Justice concurring in the result.)

Allan L. Larson, of Worsley, Snow & Christensen, Salt Lake City, for plaintiff and appellant.

William H. Henderson and Mark S. Miner, Salt Lake City, for defendant and respondent.

CALLISTER, Chief Justice:

Plaintiff insurer initiated this action to enforce its claimed right of subrogation to certain funds received by defendant in settlement of his tort action for personal injuries against third parties. Both parties moved for summary judgment based on the pleadings, affidavits, admissions and answers to interrogatories; the trial court granted judgment to the defendant. Plaintiff appeals therefrom and seeks judgment rendered in its favor.

Defendant was a passenger in a motor vehicle, owned and operated by one Jenson; plaintiff had issued a policy of insurance to Jenson. The vehicle was involved in a collision, and defendant sustained personal injuries. Plaintiff, under its medical expense coverage, paid defendant $1,000, the maximum benefit under the policy. Thereafter, defendant filed an action against the alleged tort-feasors, whom he claimed by their negligence caused the collision with the vehicle in which he was riding. Defendant alleged that he had sustained permanent injuries, and sought $65,000 general damages and $10,000 special damages. Plaintiff notified defendant's attorney of its claimed subrogation right; however, plaintiff refused to participate in defendant's action or to permit his counsel to act on its behalf. Defendant has emphasized that the law firm that represents plaintiff also represented the tort-feasors, with whom defendant entered into a settlement for a lump sum of $7,500. Plaintiff claims that it is entitled to reimbursement to the extent of $1,000 less a reasonable attorney's fee and its proportionate share of the costs from the fund recovered by defendant from the tort-feasors.

Plaintiff predicates its right of subrogation on three alternative theories: one, on an express contract as provided in the insurance policy issued to Jenson; two, on an implied contract as money had and received; or third, on a quasi contract for unjust enrichment.

The insurance contract provided that the company would pay, "on behalf of the insured," all reasonable medical expenses for bodily injury caused by accident and sus-

tained by any person while occupying an owned automobile while being used by an insured. The policy further defined an "insured" as a person or organization described under "Persons Insured." Under the express provisions of the policy, an occupant of a vehicle being used by an insured was not specified as a "person insured." The subrogation clause of the policy provided:

> In the event of any payment under the Liability or Medical Expense Coverage or under Part II of this policy, the company shall be subrogated to all the *insured's* rights of recovery therefor against any person or organization and the *insured* shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The *insured* shall do nothing after loss to prejudice such rights. [Emphasis added.]

[1, 2] From the foregoing, defendant was not an "insured" under the express provisions of the contract; and, therefore, it may not be urged that as an insured he breached the contractual provisions of the subrogation clause. Regardless of an express contract provision, an insurer may be entitled to subrogation.

> Subrogation springs from equity concluding that one having been reimbursed for a specific loss should not be entitled to a second reimbursement therefor. This principle has been accepted in the insurance field with respect to property damage, and with respect to medical costs by an impressive weight of authority. . . .[1]

[3-8] Equitable principles apply to subrogation, and the insured is entitled to be made whole before the insurer may recover any portion of the recovery from the tort-feasor. If the one responsible has paid the full extent of the loss, the insurer should not claim both sums, and the insurer may then assert its claim to subrogation.[2] Subrogation is not a matter of right but may be invoked only in those circumstances where justice demands its application, and the rights of the one seeking subrogation have a greater equity than the one who opposes him.[3] Subrogation is not permitted where it will work any injustice to others. To entitle one to subrogation, the equities of one's case must be strong, as equity will, in general, relieve only those who could not have relieved themselves.[4] The purpose of subrogation, as a creation of equity, is to effect an adjustment between parties so as to secure ultimately the payment or discharge of a debt by a person who in good conscience ought to pay for it.[5]

Plaintiff urges that defendant's settlement and release of his entire claim must necessarily include all of his medical expenses, and therefore, he has received double payment to the extent that plaintiff paid under its medical coverage. On the other hand, defendant claims that he sustained severe injuries, but he was compelled to settle for a sum that inadequately compensated him for the total damages sustained.

[9, 10] The settlement was for a lump sum without apportionment as to specific items of damage. From the state of the instant record, there is insufficient evidence to indicate whether defendant was paid twice. When the settlement was made, the tort-feasors or their representatives apparently had actual or constructive knowledge that some of defendant's medical expenses had previously been paid by plaintiff. Perhaps the negotiated settlement was reduced by this amount, particularly when defendant's counsel had been informed that he did not represent plaintiff's interest. If the settlement were intended to include plaintiff's prior medical expenses, two drafts should have been issued, one to plaintiff and defendant jointly and one to defendant, alone. If the settlement were made with knowledge, actual or constructive, of plaintiff's subrogation right, such settlement and release is a fraud on the insurer and will not affect the insurer's right of subrogation as against the tort-feasor or his insurance carrier.[6]

[11-14] The present state of the record is inadequate to establish who has the greater equity. The record does not clearly establish that the tort-feasors or their representatives had actual or constructive knowledge of plaintiff's right of subrogation. If such fact be established, they may not disregard plaintiff's known subrogation right in settling the liability. In such a case, the tort-feasors in good conscience should discharge the liability and plaintiff does not have a right in equity superior to defendant's. Furthermore, if plaintiff had an opportunity to assert its subrogation rights to the tort-feasors and neglected to give notice or enforce its demands, the trial court may determine under such circumstances that plaintiff's rights in equity are equal or inferior to defendant's, i. e., equity will not relieve one who could have relieved himself. The plaintiff to establish a superior equity and thus to be entitled to prevail must present proof which establishes that the damages covered by defendant's settlement were the same or cover those for which the defendant has already received indemnity from plaintiff; otherwise, the receipt of payment from the tort-feasor does not entitle the plaintiff to the return of the payments made by it.[7]

This cause is reversed and remanded for a trial in accordance with this opinion. No costs are awarded.

ELLETT, J., concurs.

TUCKETT, J., concurs in the result.

HENRIOD, Justice (dissenting):

I dissent. The main opinion indulges generalities as substitutes for the facts in subrogation matters relating to insurance contracts.

The policy in this case provided two things pertinent to this case: It insured Barnes, defendant here, who was no signatory to the insurance contract, but a beneficiary thereof, by the happenstance that he was a passenger in the car owned by the insured who paid the premium. As such beneficiary he obtained no greater rights under the policy than did the insured, and under the terms of the policy the insurance company, plaintiff here, was 1) required to pay medical benefits to the defendant, as passenger, and 2) was subrogated, in equity, which is the case here, to any recovery for such benefits made by defendant.[1]

Defendant, having full knowledge of the policy terms, after having been paid the maximum medical benefits of $1,000 by the plaintiff insurance company, sued for *both medical and general damages*. At this point the insurance company, plaintiff here, notified Barnes of its equitable right of subrogation to recover back what it had paid Barnes ($1,000) for the medicals. Barnes settled his suit against the tort-feasor for $7,500, giving a full release for *all*

1. State Farm Mutual Ins. Co. v. Farmers Ins. Exchange, 22 Utah 2d 183, 184, 450 P.2d 458 (1969).
2. Lyon v. Hartford Acc. & Indem. Co., 25 Utah 2d 311, 318, 480 P.2d 739 (1971).
3. Beaver County v. Home Indem. Co., 88 Utah 1, 36-37, 52 P.2d 435 (1935).
4. Ashton Jenkins Ins. Co. v. Layton Sugar Co., 85 Utah 333, 337, 39 P.2d 701 (1935).
5. Holmstead v. Abbott G. M. Diesel, Inc., 27 Utah 2d 109, 493 P.2d 625 (1972).
6. 16 Couch On Insurance 2d, § 61:197, pp. 348-350; Davenport v. State Farm Mutual Auto. Ins. Co., 81 Nev. 361, 404 P.2d 10 (1965); Hospital Service Corp. of Rhode Island v. Pennsylvania Ins. Co., 101 R.I. 708, 227 A.2d 105, 112 (1967); Sentry Ins. Co. v. Stuart, 246 Ark. 680, 439 S.W.2d 797, 799 (1969); 6A Appleman Ins. Law & Practice, § 4092, p. 246.
7. 15 Blashfield Automobile Law and Practice, § 484.6, p. 192.
1. There was nothing therein requiring the company to sue for or assist Barnes in recovering anything other than what the company had paid under the policy, the maximum $1,000.

claims, without insisting that the release include or exclude the medical payment of $1,000 already paid. In equity one is said to be required to do equity. If this be so, Barnes should have said "I have been paid $1,000 on the claim for medical damages which I sued you for along with general damages, and therefore I cannot give you a release for *all* claims unless you either pay an additional $1,000 to the insurance company or make out two checks, one to it for its equitable subrogation right of reimbursement of $1,000, leaving a second check to me for $6,500." Barnes having failed in equity either to notify the plaintiff company of its willingness to accept a sum for a "release of all claims," without condition or exclusion of the one claim,—the medical one,—is not responsive to the maxim that "He who seeks equity must do equity."[2] It is no answer for the main opinion to return this case to determine what Barnes's understanding with the defendant tort-feasor's insurance carrier was, since such circumstances are quite irrelevant and inconsistent with any rights plaintiff and defendant here may have entertained. Barnes, defendant here, cannot adjudge the conditions under which he may give a release for all claims, without reservation, without being obligated to abide by the only contract that gave him any rights for medical payments at all—the insurance policy, and the only thing involved here. It seems silly for him to say that I am bound by the policy under which, though I was no signatory thereto, I am not bound, if the insurer doesn't intervene and protect me in some fantastic claim I made in my complaint, which I admitted in my brief that I, "Barnes, fearful of losing suit . . . *settled it for a lump sum of $7,500.*" To this author, this sounds like a first-class shakedown, and as icing on a cake that would give a double payment of $1,000 medical expense paid by the plaintiff insurance company, which latter in equity should have at least some kind of relief, and which should be the amount paid, or $1,000 as compared to $7,500 settlement which should amount to 100% recovery, in my opinion, but at least a proportionate recovery from Barnes. This would seem to be equity, and there is no equity in sending this case back to determine any other equities between plaintiff and defendant, since such equities already were resolved in an insurance contract, to the terms of which Barnes was but a beneficiary, not a signatory, and to which he was no party as to subrogation rights, and in which contract he was not entitled to lay down his own rules, but to whose terms, if he relies on its terms, he must comply,—one of which is that certainly he cannot sign a release of all claims unless he recognizes the rights of the contract under which he has accepted benefits, without reserving rights to the insurer in a release.

CROCKETT, J., dissents and files opinion.

CROCKETT, Justice (dissenting):

It is important to bear in mind that, as correctly set forth in the main opinion, the defendant Barnes was not an "insured" under Jensen's policy with plaintiff Transamerica. Therefore Barnes and Transamerica had no contractual relationship nor obligations to each other. Defendant Barnes simply became a third-party beneficiary of Transamerica's promise to its insured, Jensen, that it would pay up to $1000 medical to any occupant of his car who was injured. It should be assumed that Jensen both desired and paid for this protection to his passengers, of which Barnes became a beneficiary. Transamerica received the premium for that protection and should fulfill that obligation and should not be permitted to sue and recover from the third-party beneficiary (defendant Barnes). Allowing it to take the money away from the intended beneficiary to reimburse itself results in failure to fulfill the promise for which it accepted the premium, and defeats the purpose for which its insured (Jensen) paid his money.

2. State Farm Mutual v. Farmers Insurance Exchange, 22 Utah 2d 183, 450 P.2d 458 (1969).

The conclusion thus stated is affirmed by the well known authority, Couch on Insurance, Sec. 61:172, 2d Ed., wherein it is stated:

> It may be required by statute or contract that some person other than the insured shall have the benefit of the insurance procured by the insured. *When such is the case, the insurer may not assert any claim by way of subrogation against such person, [this is] on the theory that the policy is designed to afford protection to such third person and this purpose would obviously be defeated* if the insurer could sue the third person to recover from him the payments made by the insurer to the third person. (Citation) [Emphasis added.]

It is also significant that Transamerica's policy contained numerous and ample provisions for its own protection, including rights of subrogation expressly reserved to itself, but it did not include the right of subrogation against any third-party beneficiary, therefore not against one in the position of the defendant Barnes.

Further, assuming without conceding that there may be some circumstances where such a subrogation would be available to this plaintiff, it certainly would be obliged at least to make it clearly appear that $1000 of the settlement received by Barnes in the other suit was for the medical expense plaintiff had paid. On the basis of the pleadings, affidavits, admissions and answers to interrogatories, the trial court could view the facts thus: that inasmuch as the settlement of Barnes (defendant here) in the other case wherein he settled his claim of $65,000 for $7500 was indicated as being for his personal injuries, and with no segregation nor indication as to separate medical expense, there therefore would exist no reasonable basis for a finding that the $1000 medical expense which had been paid by plaintiff Transamerica was repaid in that settlement.

On the basis of what I have said above I think the trial court was justified in concluding that there was no disputed issue of fact which if resolved in favor of the plaintiff would entitle it to prevail, and that accordingly, the summary judgment was proper in order to avoid the time, trouble and expense of a trial.

whether the insurance should be only on Mr. Lewis or whether it should be on both of them. Being then undecided, the Lewises told Mr. Pike that they would later contact him and inform him of their decision as to whether they wanted joint insurance. Pike told them that insurance could be added any time after the loan was closed. The disclosure statement contains a section entitled "Insurance" in which the following statement appears:

> *Credit Life And Disability Insurance* is not required to obtain this loan. No charge is made for credit insurance and no credit insurance is provided unless the borrower signs the appropriate statement below.

Immediately below those sentences appear blanks for the borrower to indicate how much insurance he desires, and also a space is provided for the borrower to sign if he does not want credit life or disability insurance. In this case, these blanks were not filled in and the Lewises did not sign to indicate whether they did or did not desire the insurance.

About 10 days later the Lewises returned to The Lockhart Company to pick up the check for the proceeds of their loan. They saw Mr. Pike and told him they were going to California and he wished them "a good trip." The subject of the insurance was not discussed. In early August Mr. Lewis returned to Lockhart to see Pike. The latter was not there and Lewis left a note for him relating to insurance. Mr. Lewis thereafter also tried to contact Pike by telephone, but apparently was unsuccessful. Mr. Lewis made a second personal visit to discuss insurance with Pike but again failing to find him, left another note for him. In response to that note Pike's secretary sent Mr. Lewis a letter informing him that Pike was on vacation until August 28, and that when he returned she would give him Lewis' note and "tell him what you said." Pike claims that he tried several times to reach Mr. Lewis by phone but was unsuccessful. Mr. Lewis died of a heart attack on September 17 without any credit life insurance having been put in force.

Plaintiff contends that the trial court erred in granting a summary judgment against her because there were genuine issues as to material facts with respect to whether Pike's failure to provide insurance or follow up on requests and inquiries relating to insurance constituted negligence. She emphasizes that during the loan closing she informed both Pike and her husband that she did not want a loan which did not include credit life insurance on her husband's life. Thus she argues Pike was negligent in not seeing that her demand was fulfilled prior to the issuance of the loan proceeds. The difficulty with the plaintiff's argument is that her firm resolution to have insurance on her husband was not carried into effect by her actions at the time of closing. She admits that the matter of insurance was to be left open until she and her husband got back to Pike and informed him of their decision with respect to whether they wanted joint insurance. She knew that no premium had been charged as a loan cost. She also does not claim that when she left the closing she believed that insurance on her husband was then in effect. While there is no question that she wanted her husband insured, her actions in leaving the closing knowing that no premium had been charged by Lockhart for any insurance renders her earlier expressed intentions for naught. It is clear that no order was made at closing to Pike by the Lewises for any insurance. She and her husband later picked up the check for the loan proceeds in the presence of Pike but made no inquiry nor gave any order respecting insurance.

Plaintiff further contends that Pike's failure to follow up on Mr. Lewis' requests and inquiries constitutes negligence on his part and is actionable by her because she was jointly and severally liable with him on the loan. This argument presupposes that there was some legal duty on Pike to contact Mr. Lewis and assist him in making a decision as to the Lewis's insurance requirements. Plaintiff has not cited us to any authority that in such an instance there is any legal duty on the part of an insurance agent to promptly follow up on inquiries. Had Mr. Lewis at any time given a specific order for insurance to Pike and then had Pike negligently failed to put the insurance in effect, we would have an entirely different case. The plaintiff does not claim that an order for insurance was ever given by her or her husband and thus there was no legal duty on Pike to put any insurance in effect. Had the Lewises determined at any time what insurance coverage they desired, presumably other persons in Lockhart could have taken such an order. It is regrettable that Mr. Lewis and Pike missed each other and as a consequence the insurance which Mrs. Lewis so strongly desired was never put into effect. This case serves an illustration of how important decisions and plans are often found unmade at the time of an unexpected death.

The summary judgment is affirmed. Costs awarded to respondent.

HALL, C.J., and STEWART, OAKS and DURHAM, JJ., concur.

Dave WESTLEY, Plaintiff and Appellant,

v.

FARMER'S INSURANCE EXCHANGE, dba Farmer's Insurance Group, Deveaux Clark and Clark Young, Defendants and Respondents.

No. 18225.

Supreme Court of Utah.

April 21, 1983.

Insurance agent brought action against insurance company to recover for breach of contract and defamation. The Third District Court, Salt Lake County, G. Hal Taylor, J., entered summary judgment for company, and agent appealed. The Supreme Court held that: (1) trial court did not abuse its discretion in denying insurance agent's motion to amend complaint, since amendment would have delayed trial and the substance of agent's new allegation was known a full year earlier when agent discussed it in his deposition, and (2) insurance agent could not recover from insurance company for breach of contract as a result of company's withdrawal from agent of a series of policies for which agent had received renewal commission, since the contract and all evidence clearly indicated that the policies were never intended to be part of the agreement entered into between the parties.

Affirmed.

1. Pleading ⇐236(1)

Although Rules of Civil Procedure tend to favor the granting of leave to amend complaint, the matter remains in the sound discretion of trial court. Rules Civ.Proc., Rule 15.

2. Pleading ⇐236(2)

Trial court did not abuse its discretion in denying insurance agent's motion to amend complaint filed against insurance company, since amendment would have delayed trial and the substance of agent's new allegation was known a full year earlier when agent discussed it in his deposition. Rules Civ.Proc., Rule 15.

3. Insurance ⇐85

Insurance agent could not recover from insurance company for breach of contract as a result of company's withdrawal from agent of a series of policies for which agent had received renewal commission, since the contract and all evidence clearly indicated that the policies were never intended to be part of the agreement entered into between the parties.

Lambertus Jansen, Salt Lake City, for plaintiff and appellant.

Warren Patten, Salt Lake City, for defendants and respondents.

PER CURIAM:

This is an appeal from pretrial rulings of the trial court in an action between an insurance agent and his company (hereinafter "Farmer's").

In May, 1978, plaintiff became an agent for Farmer's. The parties signed a contract which set forth the terms and conditions of their relationship. Although not mentioned in the contract, Farmer's assigned plaintiff certain policies known as "500 series," [1] for which plaintiff received renewal commissions.

In the spring of 1979, plaintiff entered into a partnership with one Joseph Boberg as a private investigator. Thereafter, he admittedly worked only part-time for Farmer's. In September, the partnership was moved to the third floor of a building in downtown Salt Lake City. The telephone was answered "law office" and later, "Boberg Westley." Farmer's advised plaintiff that it objected to the location of plaintiff's office, the manner in which the telephone was answered, and plaintiff's part-time status. When plaintiff failed to remedy the situation, Farmer's withdrew from plaintiff the "500 series" policies and reassigned them to another agent.

On April 23, 1980, plaintiff filed a complaint setting forth two counts. In the first count, plaintiff alleged that Farmer's had breached its contract with him in taking the "500 series" policies from him. In the second count, plaintiff alleged that Farmer's had defamed him. Depositions were taken and in November, 1981, Farmer's moved for summary judgment on both counts. Shortly thereafter, plaintiff retained new counsel who immediately moved for a continuance of the trial scheduled for January 13, 1982. Plaintiff also moved to amend the complaint to include an allegation that Farmer's had maliciously removed plaintiff's name from the list of agents in the telephone directory. After a hearing, the trial court entered an order which (1) denied plaintiff's motion to amend; (2) granted Farmer's motion for summary judgment on the first count of plaintiff's complaint; and (3) denied Farmer's motion for summary judgment on the second count of plaintiff's complaint. At a subsequent settlement conference, plaintiff agreed to dismiss the second count.

[1, 2] On appeal, plaintiff contends that the court erred in not allowing him to amend his complaint. Although Rule 15 of the Utah Rules of Civil Procedure tends to favor the granting of leave to amend, the matter remains in the sound discretion of the trial court.[2] On the facts presented, we are not convinced that the trial court abused its discretion in refusing to grant the requested leave to amend. An amendment would certainly have delayed the trial and the substance of plaintiff's new allegation was known a full year earlier when plaintiff discussed it in his deposition.

[3] Plaintiff also contends that the presence of factual issues precludes entry of summary judgment under Rule 56, Utah Rules of Civil Procedure. The integrated contract itself and all evidence as to the parties' understanding thereof clearly indicate that the "500 series" policies were never intended to be part of the agreement. In plaintiff's deposition, the following interchange occurred:

> Q. What was your understanding of the 500 policies as far as the company's rights to take them away from you?
>
> A. Well, I understood that as long as you were servicing the policies—or the policyholders—that really there should be no problem. However, I also knew that if the company wanted I suppose they could take them back for just about any reason.

Since there are no significant disputes present as to the contractual relationship of the parties, the summary judgment stands.[3]

Affirmed. No costs awarded.

1. Existing insurance policies written by former agents.

2. *Dupler v. Yates*, 10 Utah 2d 251, 351 P.2d 624 (1960).

3. *Morris v. Mountain States Tel. & Tel. Co.*, Utah, 658 P.2d 1199 (1983).

Wayne M. PATTERSON, Plaintiff and Respondent,

v.

ALPINE CITY, a Municipal Corporation, Defendant and Appellant.

No. 18114.

Supreme Court of Utah.

April 21, 1983.

City appealed from summary judgment rendered by the Fourth District Court, Utah County, J. Robert Bullock, J., declaring sewer connection fee invalid. The Supreme Court, Howe, J., held that: (1) sewer connection fee assessed by city was not established as required by law and was, therefore, invalid where city had not by resolution or ordinance in writing established the sewer connection fee, and (2) if sewer connection fee was to be used to retire bonded indebtedness, all users in the system had to be treated equally, and latecomers could not be subjected to arbitrary increase whereby fee of $700 in first month was increased to $1,000 in second month and $1,500 in third month, which was not required to cover increased costs, but was done to induce early purchase of required 540 connections to raise sum required to be deposited before funding was approved by appropriate federal agencies.

Affirmed.

1. Municipal Corporations ⇐106(1)

Language of statute requiring that all resolutions of municipal governments shall be in writing is mandatory. U.C.A.1953, 10 3 506.

2. Municipal Corporations ⇐712

Sewer connection fee assessed by city was not established as required by law and was, therefore, invalid where city had not by resolution or ordinance in writing established the sewer connection fee. U.C.A. 1953, 10 3 506, 10 3 717.

3. Municipal Corporations ⇐712

Municipalities may make a reasonable charge for the use of a sewer system in order that it be self-sustaining, but no greater charge is authorized. U.C.A.1953, 10 8 38.

4. Municipal Corporations ⇐712

If sewer connection fee was to be used to retire bonded indebtedness, all users in the system had to be treated equally, and latecomers could not be subjected to arbitrary increase whereby fee of $700 in first month was increased to $1,000 in second month and $1,500 in third month, which was not required to cover increased costs, but was done to induce early purchase of required 540 connections to raise sum required to be deposited before funding was approved by appropriate federal agencies. U.C.A.1953, 10 8 38.

John C. Backlund, Provo, for defendant and appellant.

Ray M. Harding, Pleasant Grove, for plaintiff and respondent.

HOWE, Justice:

Defendant Alpine City appeals from a summary judgment in favor of plaintiff declaring a sewer connection fee invalid.

In 1976 Alpine City joined with American Fork, Lehi and Pleasant Grove in establishing the Timpanogos Special Service District to create a waste water treatment facility serving the named cities. In 1977, after obtaining various loans and grants, Alpine City had to deposit the sum of $375,000 before funding was approved by the appropriate federal agencies. Alpine City estimated that with a projected hookup of 540 sewer connections, the initial price per connection would be $700.

In 1978 Alpine City enacted an ordinance which provided that a fee for connection to the city sewer system could be fixed from time to time by resolution of the city coun-

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Parties § 189 et seq.
C.J.S. — 67 C.J.S. Parties §§ 72 to 84.
A.L.R. — Defendant's right to contribution or indemnity from original tortfeasor, 20 A.L.R.4th 338.
Key Numbers. — Parties ⇨ 49 to 56.

Rule 15. Amended and supplemental pleadings.

(a) **Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) **Amendments to conform to the evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

(c) **Relation back of amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) **Supplemental pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Compiler's Notes. — This rule is substantially identical to Rule 15, F.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Amendments.

—After pretrial order.

Trial court did not abuse its discretion in allowing defendant to amend his answer to include as a defense an issue that had been specifically excluded as a trial issue by a pretrial order, where the amendment was made long before trial, the opposing party had adequate opportunity to meet the additional issue raised, and neither party was placed in a position of any greater advantage or disadvantage or prejudice by virtue of the amendment to the pleading. Lewis v. Moultrea, 627 P.2d 94 (Utah 1981).

—Alternative to dismissal.

——Payment of attorney fees.

Where, as a condition to filing their fourth amended complaint, appellants agreed to pay a $150 attorney fee, it was neither coercive nor unfair to them and is not a ground for reversal regardless of whether or not the payment of such attorney's fees are authorized by the Rules. The alternative was to dismiss, and in granting a dismissal without prejudice the court could stay any new action that might be commenced until costs of the action that had been dismissed including attorney's fees had been paid. The appellants invited the court to impose such conditions in order to avoid a dismissal and the necessity of starting over again. Tebbs & Tebbs v. Oliveto, 123 Utah 158, 256 P.2d 699 (1953).

——Prolix complaint.

Where complaint was prolix rather than being a short, concise statement of a claim as contemplated by Rules 8(a) and 8(e)(1), it was reasonable to permit plantiff to redraft pleadings rather than dismiss the action without prejudice. McGavin v. Preferred Ins. Exch., 7 Utah 2d 161, 320 P.2d 1109 (1958).

—Amendment of response.

Whether a motion to amend a response to an amended complaint should be allowed more than ten days after the amended complaint was filed lies within the sound discretion of the trial court. Wasescha v. Terra, Inc., 528 P.2d 802 (Utah 1974).

—Answer.

——To include counterclaim.

In personal injury action in which defendant's insurer was furnishing lawyer to defend insured and lawyer had not met defendant until just before taking his deposition and therefore did not know that defendant had injuries and believed plaintiff to have been at fault, refusal to allow amendment of answer to include counterclaim was an abuse of discretion since case was one where "justice requires" amendment. Gillman v. Hansen, 26 Utah 2d 166, 486 P.2d 1045 (1971).

—Complaint.

——To defeat mot ment.

An unverified am should not be allowe summary judgment if effect any substantia they were originally ings. Dupler v. Yates, 624 (1960).

——To include dam

Trial court did not to amend their compl even though plaintiff's in equity for an injunc ment did not import different cause of Whittenburg, 121 Ut (1952).

—Considerations.

——Prejudice.

A primary consider must take into ac whether leave should pleadings during trial side would be put to u having an issue adjud not had time to prepar v. Huth, 664 P.2d 45

Trial court did not e permission to amend co verse possession, wher indicated that they wo possession and had fa payment of taxes on dis v. Morgan, 689 P.2d 2

—Court's discretion.

——Abused.

Trial court abused its ther allowed the plaint plaint to conform to an time at trial nor allowe raised issue, although to trial of the new issu Nature's Way Mktg., L Ct. App. 1988).

——Not abused.

Although this rule te leave to amend a pleadi in the sound discretion discretion was not abus tiff's requested leave to where the amendment w trial and the substance gation was known a full v. Farmer's Ins. Exch., 1983).

Trial court acted wit denying plaintiff's motio

—Complaint.

——To defeat motion for summary judgment.

An unverified amendment of a pleading should not be allowed to defeat a motion for summary judgment if the amendment does not effect any substantial change in the issues as they were originally formulated in the pleadings. Dupler v. Yates, 10 Utah 2d 251, 351 P.2d 624 (1960).

——To include damages.

Trial court did not err in allowing plaintiffs to amend their complaint to include damages, even though plaintiffs' original complaint was in equity for an injunction, where such amendment did not import into the case a new and different cause of action. Hjorth v. Whittenburg, 121 Utah 324, 241 P.2d 907 (1952).

—Considerations.

——Prejudice.

A primary consideration that a trial judge must take into account in determining whether leave should be granted to amend pleadings during trial is whether the opposing side would be put to unavoidable prejudice by having an issue adjudicated for which he had not had time to prepare. Bekins Bar V Ranch v. Huth, 664 P.2d 455 (Utah 1983).

Trial court did not err in refusing plaintiffs permission to amend complaint by pleading adverse possession, where plaintiffs had earlier indicated that they would not rely on adverse possession and had failed to show requisite payment of taxes on disputed parcels. Stratford v. Morgan, 689 P.2d 360 (Utah 1984).

—Court's discretion.

——Abused.

Trial court abused its discretion when it neither allowed the plaintiff to amend his complaint to conform to an issue raised for the first time at trial nor allowed him to try the newly raised issue, although both parties consented to trial of the new issue. Lloyd's Unlimited v. Nature's Way Mktg., Ltd., 753 P.2d 507 (Utah Ct. App. 1988).

——Not abused.

Although this rule tends to favor granting leave to amend a pleading, the matter remains in the sound discretion of the trial court; such discretion was not abused in refusing plaintiff's requested leave to amend his complaint where the amendment would have delayed the trial and the substance of plaintiff's new allegation was known a full year earlier. Westley v. Farmer's Ins. Exch., 663 P.2d 93 (Utah 1983).

Trial court acted within its discretion in denying plaintiff's motion to amend her complaint to include two additional defendants where the case had been pending for over three years but plaintiff waited until just before trial to make her motion. Kelly v. Babcock & Wilcox, 746 P.2d 1189 (Utah Ct. App. 1987).

—Dismissal without opportunity to amend.

Trial court did not abuse its discretion in dismissing an action without first allowing plaintiff an opportunity to amend where the record showed that plaintiff was allowed to amend his original complaint but no amendment of substance was contained in the amended complaint and that the trial court granted continuances for plaintiff's convenience at the hearings upon the motions to dismiss but plaintiff never appeared at any of the hearings except the final motion to reconsider and set aside the order of dismissal. Davis Stock Co. v. Hill, 2 Utah 2d 20, 268 P.2d 988, cert. denied, 348 U.S. 900, 75 S. Ct. 221, 99 L. Ed. 706 (1954).

Trial court abused its discretion in dismissing an action with prejudice for failure to join indispensable parties, and not allowing an amendment or granting a continuance, even though defendant claimed no surprise but merely relied on the likelihood of increased costs and complexity if the amendment were granted. Intermountain Physical Medicine Assocs. v. Micro-Dex Corp., 739 P.2d 1131 (Ct. App. 1987).

—Following dismissal.

An order of dismissal is a final adjudication, and thereafter a complaint cannot be amended. Steiner v. State, 27 Utah 2d 284, 495 P.2d 803 (1972); Nichols v. State, 554 P.2d 231 (Utah 1976).

—Late amendment.

——Day of trial.

Trial court did not err in refusing to permit an amended answer presented for the first time at the commencement of the trial. See Hein's Turkey Hatcheries, Inc. v. Nephi Processing Plant, Inc., 24 Utah 2d 271, 470 P.2d 257 (1970).

Trial court did not abuse its discretion in denying plaintiff's motion to amend the complaint where the amendment was not sought until the day of trial and it proposed to introduce new and different causes of action. Girard v. Appleby, 660 P.2d 245 (Utah 1983).

Trial court did not abuse its discretion in denying defendant's motion, made on the day of the trial, to amend its answer to assert the statute of limitations as a defense where the essential facts upon which the statute of limitations could have been asserted were known to the defendant from the beginning and defendant alleged no surprise, discovery of new evidence relating to the defense, or other justification for its delay in asserting the statute of limitations as a defense. Staker v. Huntington

Cleveland Irrigation Co., 664 P.2d 1188 (Utah 1983).

——During or after trial.

The rule permitting amendment of pleadings is to be liberally construed so as to further the interests of justice; however, the rule is to be applied with less liberality when the amendments are proposed during or after trial, rather than before trial. Girard v. Appleby, 660 P.2d 245 (Utah 1983).

—Reply amounting to amendment.

Trial court did not err in allowing the plaintiff to file a reply in the proceeding as it was nothing more than an amendment to plaintiff's complaint. It is the substance and not the name of a pleading that determines its character. Wells v. Wells, 2 Utah 2d 241, 272 P.2d 167 (1954).

Amendment to conform to evidence.

—Allowed.

In action to recover wages for services rendered where complaint was based on both an express contract and on quantum meruit, and court struck quantum meruit after plaintiff's evidence was in, and reinstated it at the close of the defendants' evidence, such ruling on the part of the court was not error in absence of showing that the employer was misled or prevented from presenting all its evidence, since the ruling was equivalent to a rule permitting an amendment to conform to proof. Morris v. Russell, 120 Utah 545, 236 P.2d 451, 26 A.L.R.2d 947 (1951).

—Alternative to dismissal.

Allowing amendment of the pleadings to conform with the evidence adduced at trial is much preferred to the alternative of dismissal, especially where a trial has proceeded to conclusion on the existing pleadings and where the defendant has suffered no prejudice by reason of any deficiency in the pleadings. Gill v. Timm, 720 P.2d 1352 (Utah 1986).

—Amendment unnecessary.

——Consent to try issue.

In quiet title action, trial court erred when it denied plaintiff's motion for leave to amend pleading to conform to evidence, but outcome was not affected since issues were before the court by consent of both parties. Poulsen v. Poulsen, 672 P.2d 97 (Utah 1983).

——Evidence supporting findings.

Where pleading did not fill the requirement of Rule 8(a) but the evidence supported finding that defendant did owe certain amount, failure to amend fully the pleadings to this effect was nonprejudicial in view of rule. Seamons v. Andersen, 122 Utah 497, 252 P.2d 209 (1952).

——Issue raised by complaint.

Wholesaler's complaint that fishing boats were defective and not fit for purposes intended was sufficient to raise the issue of breach of express and implied warranty, without amendment of the pleadings. Pacific Marine Schwabacher, Inc. v. Hydroswift Corp., 525 P.2d 615 (Utah 1974).

—Consent to try issue.

——Not found.

Where the parties, in an action on an insurance policy, stipulated in their pleadings that the value of a building was $2,000 and while the trial was in progress one of the parties testified that he was to receive $1,000 for the building in a sale, such testimony did not put the value of the building in issue, as alone it did not amount to consent to try the issue of the value of the building. National Farmers' Union Property & Cas. Co. v. Thompson, 4 Utah 2d 7, 286 P.2d 249, 61 A.L.R.2d 635 (1955).

—Construction of rule.

This rule should be read as having two parts, the first of which is applicable when issues not raised in the pleadings are tried by the express or implied consent of the parties, and the second of which is applicable where a motion to amend is made in response to an objection to the introduction of evidence; in the first case the trial court has no discretion whether to allow amendment of the pleadings and must do so; only in the second case may the court determine whether prejudice, undue delay in amending or laches ought to prevent the amendment. General Ins. Co. of Am. v. Carnicero Dynasty Corp., 545 P.2d 502 (Utah 1976).

—Defense not pleaded.

——Affirmative defense.

Defendant was not entitled to an amendment of the pleadings under this rule so as to assert the defense of a statute of limitation where all of the facts necessary were pleaded and there was no new or different evidence. Defendant failed to assert the defense and it was waived. Apparently it was defendant's intention to waive the defense until it was discovered during the trial that plaintiff's evidence seriously weakened defendant's defense. Goeltz v. Continental Bank & Trust Co., 5 Utah 2d 204, 299 P.2d 832 (1956).

Although Rule 8(c) requires that affirmative defenses be pleaded, it must be looked to in light of the fundamental purpose of the rules of liberalizing pleading and procedure to the end that parties can present all their legitimate contentions; all that parties are entitled to is notice of the issues raised and an opportunity to meet them; therefore, where defendants did

not plead subse
tive defense to
plaintiff, whose
quent agreeme
tinuance and a
vantage in mee
not only did n
ing issue to be
it but it would
justice had it
Rucker, 14 Ut

Failure to re
answer to a co
the defense tha
ment of the ar
presented. Me
457 P.2d 966

Under Subd
fense, even an
been formally
sue has been t
sent. General I
nasty Corp., 5

Although ea
fense which w
where the evi
the principle,
to amend the
of estoppel wo
showing of a
Ranch, Inc. v.

——Issue tri

Underlying
should be gra
evidence as en
pleadings are
though defenc
defense, that
from relying
justice require
on a different
was pleaded.
Inc., 597 P.2

Trial judge
dant waived a
his pretrial
tried by the
Corp., 681 P.

—Failure to

Where defe
present contr
plaintiff's evi
within issues
plain of fin
Druper v. J.E
567, 244 P.2

—Issues not

——Mutual

Even thou
was not raise
been proper

not plead subsequent agreement as an affirmative defense to action on prior agreement and plaintiff, whose objection to evidence on subsequent agreement was overruled, sought no continuance and did not claim surprise or disadvantage in meeting the new issue, trial court not only did not abuse its discretion in allowing issue to be raised and receiving evidence on it but it would have failed the plain mandate of justice had it refused to do so. Cheney v. Rucker, 14 Utah 2d 205, 381 P.2d 86 (1963).

Failure to raise the defense of usury in an answer to a complaint constituted a waiver of the defense that could not be cured by amendment of the answer after evidence had been presented. Meyer v. Deluke, 23 Utah 2d 74, 457 P.2d 966 (1969).

Under Subdivision (b), the fact that a defense, even an affirmative defense, has not been formally pleaded is immaterial if the issue has been tried by express or implied consent. General Ins. Co. of Am. v. Carnicero Dynasty Corp., 545 P.2d 502 (Utah 1976).

Although estoppel was an affirmative defense which was not raised in the pleadings, where the evidence offered at trial supported the principle, the trial court's grant of motion to amend the pleadings to conform to evidence of estoppel would not be overturned absent a showing of abuse of discretion. Big Butte Ranch, Inc. v. Holm, 570 P.2d 690 (Utah 1977).

——Issue tried by parties.

Underlying purpose of rule is that judgment should be granted in accordance with law and evidence as ends of justice require, whether the pleadings are actually amended or not; even though defendants did not plead a particular defense, that should not have precluded them from relying on that defense if that was what justice required and if case was actually tried on a different issue or a different theory than was pleaded. First Sec. Bank v. Colonial Ford, Inc., 597 P.2d 859 (Utah 1979).

Trial judge erred in concluding that defendant waived a defense by failing to raise it in his pretrial pleadings where the issue was tried by the parties. Loader v. Scott Constr. Corp., 681 P.2d 1227 (Utah 1984).

—Failure to object to evidence.

Where defendant had ample opportunity to present contrary evidence and did not object to plaintiff's evidence on grounds that it was not within issues of case, defendant could not complain of findings based on this evidence. Draper v. J.B. & R.E. Walker, Inc., 121 Utah 567, 244 P.2d 360 (1952).

—Issues not pleaded.

——Mutual mistake.

Even though the issue of mutual mistake was not raised by the pleadings, it would have been proper for the court, in consonance with Rule 54(c)(1), to have reformed the contract if a mutual mistake of fact had been established by clear and convincing evidence. Mabey v. Kay Peterson Constr. Co., 682 P.2d 287 (Utah 1984).

—New cause of action.

Amendment may be allowed if it does not change the liability sought to be enforced against the defendant. While in a technical sense it may be a new cause of action yet it may be allowed if it is not a wholly different cause of action or legal obligation. Wells v. Wells, 2 Utah 2d 241, 272 P.2d 167 (1954).

——Child support.

Where wife brought independent action for child support claiming that prior child support award was void, but court held prior award valid, court did not err in allowing wife to amend her complaint to seek arrearage on prior award since amended complaint would still deal with same cause of action, namely, child support. Wells v. Wells, 2 Utah 2d 241, 272 P.2d 167 (1954).

—New theory of recovery.

If a theory of recovery is fully tried by the parties, the court may base its decision on that theory and deem the pleadings amended, even if the theory was not originally pleaded or set forth in the pleadings or the pretrial order. However, that the issue has, in fact, been tried, and that this procedure has been authorized by express or implied consent of the parties, must be evident from the record. Colman v. Colman, 743 P.2d 782 (Utah Ct. App. 1987).

—Not allowed.

In bank's action to recover on promissory note guaranteed by defendants, trial court properly denied defendants' motion, made after presentation of all the evidence, to amend their answers to allege that they had signed their guaranty under mistake, since there was no change in theory of issue, and since trial court had found that defendants knew what they were signing. First Sec. Bank v. Colonial Ford, Inc., 597 P.2d 859 (Utah 1979).

—Notice.

If an issue is to be tried and a party's rights concluded with respect thereto, he must have notice thereof and an opportunity to meet it. When a party has had such notice and opportunity, trial of the issue raised is fair; this rule accordingly allows liberal amendments if the issue is tried "by express or implied consent of the parties." National Farmers' Union Property & Cas. Co. v. Thompson, 4 Utah 2d 7, 286 P.2d 249, 61 A.L.R.2d 635 (1955).

—Prejudice.

A party must not be prejudiced in any way by the introduction of new issues, but where an unpleaded partnership issue was raised at

trial, was not objected to by defendant, and both sides went into facts of the partnership, there was no error in finding on the issue since there was no indication defendant was surprised or misled by introduction of the issue. Buehner Block Co. v. Glezos, 6 Utah 2d 226, 310 P.2d 517 (1957).

—Restriction to matter pleaded or tried.

In action to set aside certain deeds, the prayer of the complaint that the deeds "be declared null and void" did not open the door to allow the trial court to find the deeds invalid on any ground that might be urged at the trial; but it was restricted to the grounds set forth in the complaint, or tried by the express or implied consent of the parties. Mitchell v. Palmer, 121 Utah 245, 240 P.2d 970 (1952).

Relation back of amendments.

—Adding or substituting parties.

Generally, Subdivision (c) does not apply to amendments that substitute or add new parties to those brought before the court by the original pleadings, because such amendments amount to assertion of a new cause of action and defeat the purpose of statutes of limitations, but an exception to this rule exists, as to both plaintiff and defendant, when new and old parties have an identity of interest, so it can be assumed or proved that relation back is not prejudicial. Doxey-Layton Co. v. Clark, 548 P.2d 902 (Utah 1976); Vina v. Jefferson Ins. Co., 761 P.2d 581 (Utah Ct. App. 1988).

The relation-back doctrine did not apply to amended third-party complaint where there was no identity of interest with the existing parties other than privity of contract, since privity of contract is insufficient identity of interest for purpose of Subsection (c) of this rule. Perry v. Pioneer Whale. Supply Co., 681 P.2d 214 (Utah 1984).

Where plaintiff sought to amend complaint to include claims against third-party defendant, but plaintiff's claims against third party were not comparable in theory or damages sought to defendant's third-party complaint, third party did not have notice of plaintiff's potential claims against him within the period of the statute of limitations, nor did he have an identity of interest with those originally named as defendants. Consequently, the amended complaint did not relate back to the original complaint and was barred by the statute of limitations. Vina v. Jefferson Ins. Co., 761 P.2d 581 (Utah Ct. App. 1988).

—Statute of limitations.

Amendments are allowed to complaints and process, even though the amendment relates back to the time of original filing and even though, but for the right to amend, the statute of limitations period would have run. Meyers v. Interwest Corp., 632 P.2d 879 (Utah 1981).

—Untimely service of original complaint.

The amendment of a complaint dismissed for untimely service must also be dismissed. Cook v. Starkey, 548 P.2d 1268 (Utah 1976).

Supplemental pleadings.

—Answers.

——Allowed.

In quiet title action it is not error to permit amendment of defendants' pleadings to assert an interest in claims relocated after suit was filed but before trial. Stevens v. Memmott, 9 Utah 2d 37, 337 P.2d 418 (1959).

——Not allowed.

In taxpayers' suit seeking to set aside sale of part of tract of city property, where the complaint urged that the sale was void for irregularity of city council procedure and asked for an order that the claimants be required to remove structures placed on the property, a motion of the defendants for permission to file a supplemental answer showing a subsequent attempt to satisfy the requirements of § 10-8-8 was properly denied since the supplemental pleading was not an answer to the facts alleged in the complaint, nor justification for denying the relief prayed, except that part of the complaint that sought removal of the structures. Rowley v. Milford City, 10 Utah 2d 299, 352 P.2d 225 (1960).

Cited in Murray v. Miller, 1 Utah 2d 43, 261 P.2d 950 (1953); Ballard v. Buist, 8 Utah 2d 308, 333 P.2d 1071 (1959); Wilson v. Gardner, 10 Utah 2d 89, 348 P.2d 931 (1960); Hallstrom v. Buhler, 14 Utah 2d 111, 378 P.2d 355 (1963); Gammon v. Federated Milk Producers Ass'n, 14 Utah 2d 291, 383 P.2d 402 (1963); Falconaero Enter., Inc. v. Bowers, 16 Utah 2d 202, 398 P.2d 206 (1965); Holdaway v. Hall, 29 Utah 2d 77, 505 P.2d 295 (1973); Thomas J. Peck & Sons v. Lee Rock Prods., Inc., 30 Utah 2d 187, 515 P.2d 446 (1973); Christopher v. Larson Ford Sales, Inc., 557 P.2d 1009 (Utah 1976); Stubbs v. Hemmert, 567 P.2d 168 (Utah 1977); L.A. Young Sons Constr. Co. v. County of Tooele, 575 P.2d 1034 (Utah 1978); Porter v. Porter, 577 P.2d 111 (Utah 1978); Howard v. Howard, 601 P.2d 931 (Utah 1979); First Inv. Co. v. Andersen, 621 P.2d 683 (Utah 1980); Johnson v. Utah State Retirement Office, 621 P.2d 1234 (Utah 1980); Bradford v. Alvey & Sons, 621 P.2d 1240 (Utah 1980); Hales v. Hales, 656 P.2d 423 (Utah 1982); Alpine Credit Union v. Moeller, 656 P.2d 988 (Utah 1982); Hal Taylor Assocs. v. Unionamerica, Inc., 657 P.2d 743 (Utah 1982); Rosenlof v. Sullivan, 676 P.2d 372 (Utah 1983); Bushnell Real Estate, Inc. v. Nielson, 672 P.2d 746 (Utah 1983); Call v. City of West Jordan, 727 P.2d 180 (Utah 1986); Ebbert v. Ebbert, 744 P.2d 1019 (Utah Ct. App. 1987); Newmeyer v. Newmeyer, 745 P.2d 1276 (Utah 19
P.2d 1051 (Utah
Chavez, 749 P.2d 6

Am. Jur. 2d. —
§§ 289 to 295, 306
C.J.S. — 71 C.J.S
A.L.R. — Right t
injury action by inc
death after statute
against independent
933.

Amendment of pl
run, so as to set up
executor or administ
fessed to bring the a
out previous valid a
196.

Amendment of pl
or change capacity

Rule 16. Pre
me

(a) **Pretrial c**
motion of a part
sented parties to
for such purpos
(1) expedi
(2) establ
be protracte
(3) discou
(4) impro
tion;
(5) facilit
(6) consid
the case.

(b) **Schedulin**
to any pretrial c
may direct that
may direct the a
Scheduling or m
conferencing be
quire. Decisions
ferences may be
court may consi
(1) the fo
nation of fr
(2) the ne
ment of ple
(3) the co
(4) the ti

P.2d 1276 (Utah 1987); Tripp v. Vaughn, 747 P.2d 1051 (Utah Ct. App. 1987); Oates v. Chavez, 749 P.2d 658 (Utah 1988).

COLLATERAL REFERENCES

Am. Jur. 2d. — 61A Am. Jur. 2d Pleading §§ 289 to 295, 306 et seq., 329 to 331.

C.J.S. — 71 C.J.S. Pleading §§ 275 to 338.

A.L.R. — Right to amend pending personal injury action by including action for wrongful death after statute of limitations has run against independent death action, 71 A.L.R.3d 933.

Amendment of pleading after limitation has run, so as to set up subsequent appointment as executor or administrator of plaintiff who professed to bring the action in that capacity without previous valid appointment, 27 A.L.R.4th 198.

Amendment of pleading to add, substitute, or change capacity of, party plaintiff as relating back to date of original pleading, under Rule 15(c) of Federal Rules of Civil Procedure, so as to avoid bar of limitations, 12 A.L.R. Fed. 233.

What constitutes "prejudice" to party who objects to evidence outside issues made by pleadings so as to preclude amendment of pleadings under Rule 15(b) of Federal Rules of Civil Procedure, 20 A.L.R. Fed. 448.

Construction and application of Rule 15(d) of Federal Rules of Civil Procedure providing for allowance of supplemental pleadings setting forth transactions, occurrences, or events subsequent to original pleading, 28 A.L.R. Fed. 129.

Key Numbers. — Pleading ⇐ 229 to 286.

Rule 16. Pretrial conferences, scheduling, and management conferences.

(a) **Pretrial conferences.** In any action, the court in its discretion or upon motion of a party, may direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as:

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted for lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation;

(5) facilitating the settlement of the case; and

(6) considering other matters as may aid in the orderly disposition of the case.

(b) **Scheduling and management conferences.** In any action, in addition to any pretrial conferences that may be scheduled, the court in its discretion may direct that a scheduling or management conference be held. The court may direct the attorneys or unrepresented parties to appear before the court. Scheduling or management conferences may also be held by way of telephone conferencing between the court and counsel as the particular case may require. Decisions and agreements reached at scheduling and management conferences may be formally made an order of the court. At the conference, the court may consider the following matters:

(1) the formation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or advisability of joining additional parties or amendment of pleadings;

(3) the completion of outstanding discovery;

(4) the time for filing and hearing of motions;